In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 717

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RELEVANT DOCKET ENTRIES

Radio Television News Directors Association, et al. v. *Federal Communications Commission,* No. 16369

7–27–67	Docketed cause
7–27–67	Filed original and 4 copies joint petition to review an order of the F.C.C., service
8– 8–67	Filed original and 4 copies supplement to joint petition to review an order of F.C.C., service
9– 5–67	Filed original and 4 copies motion to accept certified index to record
9– 7–67	Entered order granting motion of September 5, 1967
9– 8–67	Filed index to record per order of 9–7–67
10– 2–67	Filed original and 4 copies joint motion for approval of stipulation as to procedural schedule, affidavit and service
10– 2–67	Entered order granting procedural schedule for filing of briefs and appendix
10–23–67	Filed original and 4 copies motion to consolidate for the purpose of briefing, affidavit and service

[Subsequent entries set out below]

National Broadcasting Company, Inc. v. *United States of America and Federal Communications Commission,* No. 16498

10–14–67	Docketed cause (Transfer from Second Circuit)
10–14–67	Filed original file of U.S.C.A.–2 per order of September 25, 1967
10–23–67	Filed original and 4 copies motion to consolidate for the purpose of briefing, affidavit and service

[Subsequent entries set out below]

Columbia Broadcasting System, Inc. v. *United States of America and Federal Communications Commission*, No. 16499

10–14–67	Docketed cause (Transfer from Second Circuit)
10–14–67	Filed original file of U.S.C.A.–2 per order of September 25, 1967
10–23–67	Filed original and 4 copies motion to consolidate for the purpose of briefing, affidavit and service

[Subsequent entries set out below]

The following entries appear with substantial uniformity in the docket sheets for each of Nos. 16369, 16498 and 16499:

10–24–67	Entered order that cases be consolidated for briefing and argument, etc.
11–21–67	Filed original and 4 copies motion of petitioner for leave to file a separately bound exhibit with brief, service
11–21–67	Entered order granting leave to file separately bound printed exhibit with brief
11–21–67	Filed 30 copies brief for petitioner (National Broadcasting Co.), service
11–21–67	Filed 30 copies printed copies exhibit to brief for petitioner
11–21–67	Filed 30 copies petitioner brief, service
11–21–67	Filed original and 4 copies petition of King Broadcasting Co. for leave to file brief as amicus curiae, service
12– 5–67	Filed 30 copies of amicus curiae brief
12– 6–67	Entered order granting motion of November 21, 1967
12–14–67	Filed original and 4 copies motion to extend time to file respondent brief to January 22, 1968, affidavit and service
12–18–67	Entered order granting motion of December 14, 1967
12–18–67	Filed original and 4 copies motion of respondent to hold petition for review in abeyance
12–18–67	Filed original and 4 copies motion of respondent to correct motion for extending time to file brief, affidavit and service

12–29–67	Filed original and 4 copies answer to motion to hold cases in abeyance
1– 2–68	Entered order granting motion of December 18, 1967, etc.
1– 3–68	Filed motion for certificate of record, affidavit and service
1– 3–68	Entered order granting motion of January 3, 1968
1– 4–68	Filed original and 4 copies designation of record for use in Supreme Court in connection with petition for certiorari, service
1– 4–68	Filed copy of record of F.C.C. and transmitted to Supreme Court in connection with petition for certiorari (per order)
1– 4–68	Entered order granting motion of January 4, 1968
1–12–68	Filed notice of docketing in Supreme Court as No. 993
1–30–68	Filed original and 4 copies motion to transfer transcript of record to F.C.C., service
2– 5–68	Filed certified copy order of Supreme Court denying certiorari
2– 8–68	Entered order granting motion of January 30, 1968
2– 8–68	Filed 30 copies of petitioner brief, corrected, and service
2– 9–68	Forwarded record to F.C.C. per order of February 8, 1968
2–23–68	Filed original and 4 copies of F.T.A.S. motion to file a brief and participate in oral argument as amicus curiae, affidavit and service
2–27–68	Filed original and 4 copies motion to extend time to file respondent brief to March 4, 1968, affidavit and service
2–27–68	Entered order granting extension of time to file respondent brief to March 4, 1968
2–27–68	Entered order granting leave to National Academy of Television Arts and Sciences to file brief as amicus curiae, etc.
2–28–68	Filed original and 4 copies of motion for leave to file an amici curiae brief and appearance for the United Church of Christ, affidavit and service
2–29–68	Filed 30 copies of Comm. of United Church of Christ, et al. brief amicus curiae
2–29–68	Entered order granting motions of February 28, 1968

3– 4–68 Filed original and 4 copies of motion of respondent to hold cases in abeyance and to authorize further proceedings, service

3–13–68 Filed original and 4 copies response to motion to hold cases in abeyance and to authorize further proceedings, affidavit and service (N.B.C.)

3–14–68 Filed original and 4 copies response to motion of respondent to hold cases in abeyance and to authorize further proceedings, affidavit and service (C.B.S.)

3–14–68 Filed original and 4 copies answer of petitioner to motion to hold cases in abeyance (Radio Television News Directors Association, et al.)

3–22–68 Entered order denying motion of March 4, 1968 and that Government brief be filed on April 1, 1968 and petitioner brief within fifteen days thereafter, etc.

3–22–68 Filed original and 4 copies of respondent reply to petitioner response to hold cases in abeyance, etc., affidavit and service

3–22–68 Filed original and 4 copies amendment to answer of R.T.N.D.A. to motion to hold cases in abeyance, etc., affidavit and service

4– 1–68 Filed original and 4 copies motion for enlargement of time to argue orally and to permit separate counsel to argue for petitioners in each case, affidavit and service

4– 1–68 Filed 30 copies of respondent brief

4– 2–68 Entered order granting motion of April 1, 1968 (oral argument set for 1½ hours for each side)

4–4–68 Filed original and 3 copies of respondent motion for acceptance of supplemental index to official record, affidavit and service

4– 8–68 Entered order granting motion to file certified copy of supplemental index

4– 8–68 Filed certified copy of supplemental index

4–12–68 Filed 30 copies of amicus curiae brief (N.A.A.S.)

4–15–68 Entered order granting extension of time to file reply brief for N.B.C. to April 19, 1968

4–15–68 Filed original and 4 copies of motion to extend time to file reply brief of N.B.C. to April 19, 1968, affidavit and service

4–16–68	Filed 30 copies of Columbia reply brief
4–16–68	Filed 30 copies of R.T.V.N.D. reply brief
4–16–68	Filed original and 4 copies motion of petitioner for leave to file supplemental exhibit, affidavit and service (16498 only)
4–17–68	Entered order granting motion of April 16, 1968 (C.B.S. supplemental exhibit)
4–18–68	Filed 30 copies of reply brief for N.B.C., service
4–17–68	Filed 30 copies of supplemental exhibit to reply brief for C.B.S.
4–19–68	Filed 30 copies of joint appendix, service (16369, 16498–99)
5–14–68	Filed original and 4 copies motion of amici curiae to present oral argument, affidavit and service
5–14–68	Filed original and 4 copies opposition to motion for leave to present oral argument, affidavit and service
5–15–68	Entered order denying motion of amici curiae
5–17–68	Heard and taken under advisement (16369, 16498, 16499)
9–10–68	Entered judgment that the FCC order adopting the personal attach and political editorial rules, as amended, be set aside, in accordance with the opinion of this Court filed this day
9–10–68	Entered opinion by Judge Swygert
9–30–68	Filed original & 3 copies motion of respondent to stay mandate, affidavit & service (16369–16498)
10– 3–68	Filed original & 4 copies of petitioner's answer to motion of respondent to stay mandate, affidavit & service (16369–498)
10 7–68	Filed original & 3 copies of opposition to motion for stay of mandate, affidavit & service (16369–498)
10–11–68	Entered order granting motion of 9–30–68 per rule 41(b) (16369–16498)
11–12–68	Filed notice of docketing in Supreme Court as No. 71[7] (16369–498)
1–17–69	Filed order of Supreme Court granting certiorari entered 1–13–69

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 16,369, 16,498 and 16,499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

NATIONAL BROADCASTING COMPANY, INC., *Petitioner*

v.

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

On Petitions to Review an Order of the Federal Communications Commission

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JOINT APPENDIX

Summary of Proceedings Below

1. F.C.C. Notice of Proposed Rule Making, adopted April 6, 1966, released April 8, 1966.

2. F.C.C. Order extending time for filing comments from May 16, 1966, to June 20, 1966, and for filing reply comments from May 31, 1966 to July 5, 1966, released May 4, 1966.

3. F.C.C. Memorandum Opinion and Order adopting Rules, adopted July 5, 1967, released July 10, 1967.

4. F.C.C. Memorandum Opinion and Order amending Rules, adopted August 2, 1967, released August 7, 1967.

5. F.C.C. ERRATUM to its Memorandum Opinion and Order of August 7, 1967, released August 9, 1967.

6. F.C.C. Memorandum Opinion and Order revising Rules, adopted March 27, 1968, released March 29, 1968.

Notice of Proposed Rule Making

1 Before the

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

Docket No. 16574

In the Matter of

Amendment of Part 73 of the Rules to provide procedures in the event of a personal attack or where a station editorializes as to political candidates

Notice of Proposed Rule Making

By the Commission: Commissioner Hyde abstaining from voting; Commissioner Bartley dissenting to the issuance of a proposal that a rule be adopted in this area; Commissioner Loevinger absent.

1. Notice of Proposed Rule Making is hereby given in the above-entitled matter.

2. The "fairness doctrine" provides that if broadcast licensees permit their facilities to be used for the discussion of a controversial issue of public importance, they must afford a reasonable opportunity for the presentation of conflicting views. The basic enunciation of this doctrine is contained in the Commission's 1949 *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246. Subsequently, the doctrine was recognized by Congress in the 1959 amendments to Section 315 of the Communications Act (Public Law 86-274). In the Editorializing Report, the Commission stated that ". . . elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station." (p. 1258). This statement embodies a part of the fairness doctrine known as the "personal attack" principle, which is applicable "where there are statements, in connection with a controversial issue of public importance, attacking an individual's or group's integrity, character or honesty or

like personal qualities." Public Notice of July 1, 1964, (Fairness Primer) FCC 64-611, 29 F.R. 10415, page 17.

3. In its rulings the Commission has set forth the obligation of a station licensee when a personal attack occurs over his facilities, i.e., the licensee must send a transcript or summary of the attack to the individual or group attacked, together with an offer of time for an adequate response. See *Clayton W. Mapoles,* 23 Pike and Fischer, R.R. 586 (1962); *Billings Broadcasting Co.,* 23 Pike and Fischer, R.R. 951 (1962); *Times-Mirror,* 24 Pike and Fischer, R.R. 404 and 407 (1962); and *Springfield Television Broadcasting Corp.,* 4 Pike and Fischer, R.R. 2d 681, 685 (1965). We notified all licensees of their responsibility in this respect, by transmitting to them the July 25, 1963 Public Notice (FCC 63-734) and the 1964 Fairness Primer, *supra.* Despite such notification and the Commission's rulings, the procedures specified have not always been followed even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now propose to codify the procedures which licensees are required to follow in personal attack situations. Two important purposes will be served by such codifications. First, it will emphasize and make more precise licensee obligation in this imporant area. Second, it will assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed.

4. We have used the phrase, "in appropriate circumstances", because we recognize that in some instances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance. The proposed rules are not designed to answer such questions. When they arise, licensees will have to continue making good faith judgments based on all of the relevant facts

and the applicable Commission rulings and interpretations.[1] We emphasize that it is not our intent to use the proposed rule as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle. The rules are directed to situations where the licensees did not comply with the requirement of the personal attack doctrine as to notification and offer of time to respond, even though there could be no reasonable doubt under the facts that a personal attack had taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist).

5. As indicated, the proposed rule, with minor changes, codifies existing procedures in personal attack situations. Paragraph (a) places specific procedural responsibilities on the licensee over whose facilities a personal attack has been broadcast. A licensee would be required to send a tape, transcript or summary of the attack to the attacked person or group within a reasonable time and in no event later than one week after the attack.[2] The one-week
3 outer time limit thus does not mean that such a copy should not be sent earlier or, indeed, before the attack occurs, particularly where time is of the essence. Along with the copy, the licensee would be required to send the attacked person or group a notice stating when the attack occurred and containing an offer of a reasonable opportunity to respond. This is all that would be required by the rule. Other matters would be left to the reasonable judgment of the licensee and to good faith negotiations. For example, the licensee could impose a reasonable time limit in which the person notified would be required to re-

[1] In appropriate cases, licensees can and should promptly consult the Commission for interpretation of our rules and policies.

[2] Where a licensee determines that a personal attack has not occurred but recognizes that there may be some dispute concerning this conclusion, he should keep available for public inspection, for a reasonable period of time, a tape, transcript or summary of the broadcast in question.

spond. The licensee might make inquiries concerning willingness to pay along the lines described in our recent ruling in *Red Lion Broadcasting Co., Inc.*, 1 FCC 2d 1587, part. 1 (1965). The rule again is not designed to cover any of these other facets. Guidance in these respects would be available in the Commission's interpretative rulings, and any controversies would be considered by the Commission in the context of specific factual situations.

6. We have excluded from the proposed rule personal attacks on foreign groups or foreign public figures. Excluded also are situations where personal attacks are made by political candidates, their authorized spokesmen, or those associated with them in the campaign against other candidates, spokesmen, or persons associated with them in the campaign. The exclusion of attacks on foreign leaders follows present policy. Note, page 18, Fairness Primer, *supra*. The exclusion of attacks by candidates against other candidates recognizes that the "equal opportunities" provision of Section 315—and not the personal attack doctrine—is generally applicable to this situation. Finally, the fairness doctrine may, of course, be applicable to particular factual situations in the political broadcast field. The necessity for notice and other procedures in the event of a personal attack may be different in this field. We shall continue our present practice of interpretative rulings given in specific cases in the political broadcast area. With further experience, we may be in a position to delineate more precisely licensee responsibility in this area.

7. We also propose a rule to implement the *Times-Mirror* ruling as to station editorials endorsing or opposing political candidates. Such political editorials are increasing,[3] with some indication of failure to comply with the corresponding obligation to observe the *Times-Mirror* requirement. The rule would require that the appro-

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[3] In 1960, 53 Standard broadcasting and 2 television stations carried political editorials during the general elections. Their number had increased to 103 standard broadcasting and 13 television stations by 1964.

priate candidate (or candidates) be informed of the station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and be offered reasonable opportunity to respond. We have used the phrase "reasonable opportunity" here and in the proposed personal attack rule because such opportunity may vary with the circumstances; in many instances, comparable opportunity in time and scheduling is clearly appropriate. But in some, where the endorsement involved may be one of many and involve just a few seconds time, reasonable opportunity may call for more than a few seconds if there is to be a meaningful response. See *Final Report of the Senate Committee on Commerce,* Sen. Report 994, Part 6, 87th Cong., 2d Sess., p. 7. We also propose that the notification time in this respect be within 24 hours of the editorial; time is much more of the essence in this field, and there would appear to be no reason why the licensee could not readily inform the candidate of the editorial. Indeed, the licensee might again make the notification required before the broadcast of the editorial; such prior notification and opportunity for response would be required in the case of a political editorial broadcast close to the election. As in the case of the personal attack proposal, the rule does not purport to deal with all facets of the *Times-Mirror* ruling. The licensee could impose reasonable limitations, such as the appearance of a spokesman for the candidate, in order to avoid any Section 315 "equal opportunities" cycle; the matter of time of scheduling would also be left to reasonable judgment and negotiation. Finally, the rule is directed only to station editorials endorsing, or opposing, political candidates. The applicability of *Times-Mirror* to other situations would be left to rulings in particular factual settings.[4]

8. Pursuant to applicable procedures set out in Section 1.415 of the Commission's Rules, interested parties may

[4] Thus, *Times-Mirror* itself did not involve a station editorial. The *Times-Mirror* situation, since it did involve personal attacks, would come within paragraph (a) of the proposed rule.

file comments herein on or before May 16, 1966, with reply comments due on or before May 31, 1966. In reaching its decision herein, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

5 9. Authority for adoption of the rules proposed herein is found in Sections 4(i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

10. In accordance with the provisions of Section 1.419 of the Rules, an original and 14 copies of all written copies shall be furnished to the Commission.

FEDERAL COMMUNICATIONS COMMISSION

(SEAL) BEN F. WAPLE
Secretary

Attachment
Adopted: April 6, 1966
Released: April 8, 1966

6 APPENDIX

Section 73.123 is added to read as follows:

§ 73.123 Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (i) a script or tape (or an accurate summary, if a script or tape is not available) of the attack; (ii) notification of the date, time and identification of the broadcast; and (iii) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) shall be inapplicable to attacks on foreign groups or foreign public figures or where such attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign.

Note: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See Section 315(a) Applicability of the Fairness Doctrine, 29 F.R. 10415.

(c) Where a licensee, in an editorial, endorses or opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to the other qualified candidate or candidates for the same office (i) a script or tape of the editorial; (ii) notification of the date and the time of the editorial; and (iii) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities.

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13 **Comments of International Typographical Union (AFL-CIO)**

1. These comments are filed on behalf of International Typographical Union (AFL-CIO), a labor organization headquartered in Colorado Springs, Colorado with a current membership of over 100,000. The International Typographical Union was established in 1852 and is the oldest labor organization in the United States.

2. The International Typographical Union is particularly interested in the fairness doctrine because of the use of the public airwaves in connection with labor disputes and the fair treatment of public issues generally by broadcasters is an essential element of the rights of the citizen in a democ-

racy. The International Typographical Union long ago adopted a fairness doctrine for its own elections whereby candidates for international office receive free space in *The Typographical Journal,* giving each candidate an equal opportunity to make his views known to the members. Therefore, when we endorse, as we do, the Commission's fairness doctrine, we know whereof we speak. Democracy is promoted by giving candidates an equal oportunity to disseminate their views in public elections as well as in union elections.

3. We therefore endorse and urge adoption of the proposed rule codifying the fairness doctrine. We envision that broadcasters will complain that this rule deprives them of their rights under the First and Fifth Amendments, but they forget all too easily that a broadcast license is not a property right and that they hold these licenses in trust for the public and not primarily for their own financial welfare.

14 Nor is there a First Amendment right to use the public airwaves to foreclose opposing views from obtaining equal public audience.

4. We urge that the proposed rule should be expanded to embody also the statutory policy requiring broadcasters to open their facilities to public groups to state their views on issues of importance. Promulgation of such a provision simultaneously with or as a part of the proposed rule is necessary lest the rule have the undesired effect of discouraging broadcasters from discussion of public issues.

5. Such an amendment to the proposed rule would be consonant with what Congress itself did in amending § 315 in 1959. At the same time that Congress reaffirmed the equal time doctrine, Congress said:

> "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from

the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

This provision was inserted lest the requirement for equal time be read to discourage the broadcasting of discussion of public issues. The same reason militates in favor of a similar provision in the Commission's rule. Indeed, we think that the language the Congress itself has chosen would be appropriate for the rule.

6. We are particularly concerned with this issue because of the difficulties which we and other unions have experienced in publicizing our position in labor disputes. Many broadcasters also own newspapers and for that reason, or perhaps because they are themselves employers, generally favor the employer's position against that of the union in any labor dispute. Moreover, in many communities, particularly in the South, the major media of communication fail to provide the public with the union's side of the issue. They fail to do so either due to their own views or because they fear reprisals from advertisers. When a newspaper is one-sided, its failure to fulfill its responsibilities to the public is protected by the Constitution; nor would we have it otherwise. However, the public airwaves are a material resource which in a democracy can have no more important use than to promote the exchange of views on matters of public importance. The failure of other media of mass communication to deal adequately with labor disputes serves rather to increase than to decrease the obligations of broadcasters lest the public remain ignorant, or what is perhaps worse, hear only one side of the story.

7. A current situation in Lafayette, Louisiana is illustrative of this problem. Since December 1964 there has been a strike by Lafayette Typographical Union No. 832, one of

the affiliates of the International Typographical Union, against the publisher of the Lafayette Advertiser, a daily newspaper which is the only newspaper in the Lafayette area. There has been a refusal of this company to recognize the union, a refusal which is presently the subject of a complaint against the company issued by the General Counsel of the National Labor Relations Board. The issue is obviously one of great public importance and interest in the community and for obvious reasons the struck newspaper is not available to the union as a medium for the expression of its views. Accordingly, the union has made strenuous efforts to obtain air time on the local broadcasting stations. It offered to submit the script for its proposed program for review by the station. In every instance the union was denied the opportunity to purchase the time. The dereliction of the broadcasters in Lafayette is noteworthy in this rule-making proceeding because it is symptomatic of a prevalent practice contrary to the public interest as defined by Congress. Local counsel has written this Commission with specific reference to that case and we trust that these broadcasters will soon be disabused of their excessively narrow view of their duty. However, other broadcasters doubtless share their misconception and the proposed rule's emphasis on equality may mislead others into believing that a neutral silence respecting controversial issues is the extent of their duty. The Lafayette situation of total blackout of the union's views in a labor dispute has recently been duplicated in Sioux Falls, South Dakota and Pensacola, Florida.

8. We urge, therefore, that the Commission adopt its proposed rule, but amending it as follows:

1. Change title to read "Section 73.123—Personal Attacks; Political Editorials; Obligation to Encourage the Discussion of Controversial Issues."

16 2. Add a new paragraph as follows:

"Nothing in the foregoing rule shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under the Communications Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Respectfully submitted,

/s/ GERHARD P. VAN ARKEL
Gerhard P. Van Arkel

/s/ GEORGE KAUFMANN
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VAN ARKEL & KAISER
Of Counsel

May, 1966

17

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May 9, 1966

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C. 20554

Dear Mr. Waple:

This letter is in response to the Commission's Public Notice B, Report No. 5947, dated April 8, 1966, in which the commission invited comments on its proposal to incorporate the "fairness doctrine" in its broadcast rules.

The incorporation of this new rule might well bring about a result quite different from that intended.

The apparent purpose of the new rule is a good one: to insure that broadcasters treat both sides of a controversial issue or campaign fairly.

However the proposed rule includes some broad language which, in its untried state, could prove quite uncertain to a conscientious broadcaster.

For instance, the proposed rule would provide that when "an attack is made upon the . . . character . . . of a group," the licensee shall furnish a script, tape or summary to the group and offer an opportunity to respond.

A broadcaster who has encouraged lively discussion of important public issues can easily imagine the following:

A Republican saying that Democrats are war-mongers (or a Democrat saying that Republicans are war-mongers).

A John Birch society member saying that pacifists are spineless.

A liberal saying that conservatives are selfish.

A conservative saying that liberals are reckless.

18 The broadcaster must then decide whether a charge that someone or some group is reckless, selfish, spineless or a war-monger is "an attack upon the character or like personal quality" of that person or group.

And if he decides that there was such an attack, he must determine who among the liberals, conservatives, pacifists or party members should receive the tape and an offer of time to respond.

We realize that the broadcaster has the obligation to inform aggrieved persons of an attack, and to offer the use of his facilities for a response. But this obligation is already implicit in the Fairness Doctrine, and no further action is necessary to satisfy it.

Under the broad language of an untested new rule, however, the broadcaster may see himself confronted with a mammoth task of providing tapes or scripts to far-flung people with little assurance that he is even then satisfying the rule.

It is not likely to encourage the presentation of spirited public debate on volatile issues. And it will not provide any new rights to persons or groups who might be attacked.

We therefore respectfully recommend that proper handling of controversial issues and campaigns be left to fair-minded broadcasters and commissioners without complex new rules.

Sincerely,

/s/ FRED PAXTON
Fred Paxton
Managing Director

FP/cc

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Peace Valley Road
Towaco, New Jersey
May 11, 1966

Federal Communications Commission
Washington, D. C. 20554
Attention: Mr. Ben F. Waple,
Secretary

Gentlemen:

Attached is an original and 14 copies of comments filed in the matter of proposed Commission rulemaking in Docket 16574. While my general response is favourable to the proposed rule changes, I respectfully offer suggestions aimed at making the significance of Commission effort more meaningful.

Should the Commission find that further comment in the matter of instant concern would be useful, I should

appreciate the opportunity to place myself at your disposal for this purpose.

Very truly yours,

/s/ JOSEPH H. CHISLOW
Joseph H. Chislow

Att.
Comments Docket 16574

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20 **Comments for File on Proposed Rulemaking in Docket No. 16574**

Pursuant to solicitation by the Commission for comment by interested persons in the matter of proposed rulemaking in the above listed Docket, comment thereon is herewith respectfully filed.

No exception is taken in respect to Commission intent to regulate abuses in the application of the "fairness doctrine" by broadcast station licensees. Rather, flagrant broadcaster disregard for the elementary principles of fairplay have become so frequent in recent years, as almost to argue that militance to protect free speech from becoming license, is long overdue. This is not a criticism of the Commission, it is instead an expression of admiration for the patient and long-suffering tolerance of the FCC toward the mounting disregard by broadcasters for the principles enunciated by the Congress as stated in the Conference Report on the 1959 Amendment to Section 315 (a) to wit:

> "Nothing in this sentence shall be construed as relieving broadcasters—from the obligation imposed on them under this act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Comments of Joseph H. Chislow

The undersigned wishes to congratulate the Commission for their proposal to codify the serial behavior required of broadcasters who use their public interest, station-licensed facilities to air personal attacks on individuals or groups.

To the extent that the proposed rulemaking seeks to establish criteria, calling for positive implementation of the "fairness doctrine", no other expression but full concurrence is intended. However the language of § 73.123 (a) neglects aspects of application to which the body of the instant rulemaking proposals alludes.

21 The Commission has defined the personal attack principle as applying to the besmirchment of the "honesty, character, integrity or like personal quality of an identified person or group." Yet a fundamental technique of the personal attack art is to quote incontextually from comments elicited from persons or groups on subjects not necessarily related to the subject at broadcast issue and by film-clip or tape-editing, to present those comments as the instant and, implicitly, the total attitude of persons or groups to controversial issues of public importance. Editorializing can be made to appear as solely the derisive appearance on the face of a program editorialist. Admittedly, it is difficult to restrain the facial contortions of commentators on issues of public importance. A large part of their function is to "act" before the televiewing audience and, if their sole inflammatory contributions to the viewing public were attributable to facial mobility, little harm to public opinion would be likely.

But, when the incontextual quotation ploy is verbally exploited, through what can only be regarded as the primary opinion forming medium in the United States, serious personal attacks is deliberately possible and often occurs.

A typical case of this precise sort is readily available to illustrate the practice. On June 10, 1964, a national TV

network carried a widely viewed, sponsored, one hour, network documentary on prime time, entitled "Murder and the Right to Bear Arms."

A purportedly reportorial, rather than editorial presentation, it nonetheless featured a highly covered bias favouring the views of proponents of stringent firearms regulation. The design of the program was so deliberate as to discredit the case for the opponents of stringency in this matter. Further, it served as a blatant pedestal for developing public fervour for the passage of the "Dodd (firearms registration and control) Bill" at a time when our citizenry was justifiably incensed over the assassination of our President.

To accomplish this objective, it sought to ridicule the officers and membership of the National Rifle Association of America. Through the device of the incontextual film-clip the broadcasters were able to pit "expert" rebuttal against the pre-collected, pre-canned expression of the incontextual and unresponsive views of the NRA, to controversial issues of public importance. Of course, since the program was billed as reportorial, no access for personal attack response was ever provided by the network.

22 In direct consequence of this propaganda technique, more reminiscent of Nazi Germany and Communist extremism, than hopefully of our own United States, opinion generation has led to impactive hysteria, receptive to a rash of stringent anti-gun laws, either now on the books, or well on the way to that end, in communities and states across the nation.

The example cited is offered because it is believed to be a familiar manifestation of an abuse with which the Commission must come to grips, if the blessing of freedom of expression is not to become a monster engine, ordering its own destruction.

In expressing sympathy for the problem which he Commission faces, it is appreciated that no mechanical formula within a fairness doctrine will always work, if scheming evasion is deliberately planned. The dilemma of what to do when seeking to encourage freedom of expression without encouraging license, cannot easily be solved when one deals with intangibles of right or wrong, of fairness or unfairness, of reasonable opportunity for unprejudiced argument on all sides of a public issue, as opposed to a tolerated capability for unreasonable, rigid, capricious suppression or distortion of an opponent view to the benefit of the proponent position.

The Commission is uniquely qualified and indeed, uniquely obliged, to give leadership to the resolution of a code of broadcaster ethics. In proposing authority now to deal with that codification, the Commission is properly exercising the will of the Congress. To implement that will along the lines herein designated, calls for no more than a minor clarification to the language of your proposed rulemaking. That modification is herewith respectfully offered in the hope that it will stimulate your expression, if not in the precise words suggested, at least toward the objectives sought.

The need, not provided for in your proposed rulemaking to enunciate "reasonable time" in terms which will not make ridiculous a formula 7-day response to an issue to be publicly decided on the day following the airing of a broadcast editorial, is obvious. Equally obvious, it is trusted, is the need to provide for network responsibility for a network-incurred personal attack obligation, as the logical alternative to individual station response to conceivably in excess of a hundred network station licensees, which distribute, but do not initiate a personal attack. Clearly, the privilege of response to each station's
23 individual responsibility under § 73.123(a) could be more burdensome than the attack. In defining the

mutual responsibilities of member stations in a network, Commission codification in this matter would be made meaningful.

Respectfully submitted,

/s/ JOSEPH H. CHISLOW
Joseph H. Chislow

Att.
Appendix 73.123 as modified

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24 APPENDIX

73.123—(a) When, during the—an identified person or group, (or that person or group is held to ridicule by opponent presentations inflammatory to the public view of the person or group, or when incontextual quotations attributable to that person or group are unfavorably presented as the specific attitude or response of that person or group to a public issue), the Licensee shall—

b(1) Reasonable time shall be understood to be governed by the timeliness of public response to a controversial issue of public importance. Where public opinion may be expected to be influenced in matters affecting legislation, or to exert influence on legislation, editorial attacks calling for the serial performance of (i), (ii) and (iii) by the broadcaster, shall not occur unless there is sufficient reasonable time for the person or group attacked to take timely access to the station licensee's facilities for considered response.

b(2) It shall be further understood that where a personal attack or political editorial adverse to a person or group is carried by affiliates of a network, the obligation for conformity with paragraph (b) shall rest with each station licensee involved and shall call for compliance with the

Letter of the National Council of the Churches of Christ

provisions of its requirements, by providing adversary access to the same network facilities as were employed in the initiating personal attack or political editorial.

(c) Formerly (b) unchanged.

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25 NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.

475 RIVERSIDE DRIVE, NEW YORK, N.Y. 10027

May 16, 1966

The Chairman
Federal Communications Commission
Pennsylvania Avenue at 12th Street
Washington, D. C.

Dear Mr. Chairman:

With regard to Report No. 5947, dated April 8, 1966, a proposal of the Commission to amend broadcast rules in matter of personal attacks and political editoralizing, the Broadcasting and Film Commission of the National Council of the Churches of Christ in the U.S.A. has considered this matter and has taken action in support of the Commission's proposal.

We believe that this portion of the so-called Fairness Doctrine has been in fact a guiding principle for rulings of the Commission for some time. Further, we believe the provision requiring licensees to notify any person or group whose character, integrity, or like personal qualities is attacked on their station is entirely consistent with the public interest. Finally, we believe that requiring a licensee to offer a reasonable opportunity to persons attacked to respond over his facilities places proper responsibility upon the licensee and does not cause him undue hardship.

Comments of Laborers' International Union

For these reasons we encourage the Commission to incorporate these elements of the Fairness Doctrine into its broadcasting rules.

Sincerely,

/s/ WILLIAM F. FORE
William F. Fore

WFF:CP

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26 **Comments of Laborers' International of North America**

These comments are filed on behalf of Laborers' International Union of North America (AFL-CIO), a labor organization headquartered in Washington, D.C., with a current membership of approximately half a million. This International Union was established in 1903 and is the sixth largest in the AFL-CIO, and is the largest per capita paying affiliate of the Building Construction Trades Department.

This labor organization is especially interested in the fairness doctrine because of the ever increasing use of the public air waves in connection with organizational campaigns and the presentation of labor-management matters, to the public. The concept of the citizens' "right to know" all sides of issues is part and parcel of the fairness doctrine and an essential ingredient in a democratic society.

In the course of our organizational activities, particularly in the South, we have come to know first-hand what one-sided communication media can be. It is a well known fact that the organized business community has accesses to local "civic" organizations, local newspapers, local Chamber of Commerce, and law enforcement groups, etc. The National

Labor Relations Board has examined and set aside representation elections where these "local" forces operated to deny employees the right to freely exercise their choice in representation elections in industries affecting commerce. In a recent decision the NLRB set forth the rule that prior to a representation election all interested parties are entitled to the list of employees' names and addresses so that an equal opportunity can be given to the union to urge the employees and respond to the employers' and communities' propaganda as well as to tell its own story. Thus, efforts are being made to equalize the communication channels which presently favor the entrenched establishments, and we submit that the Commission's
27 fairness doctrine would constitute an important step in the direction of assuring that one of the major media of communication is kept open to provide the public with the union's side of the issue.

It is unquestioned that a broadcast license is clothed with the "public interest" and is granted in trust not for the licensee's personal profit or to serve a divided interest, but rather, as the Congress itself stated in amending Section 315 in 1959, "to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

We urge, therefore, that the Commission adopt its proposed rule, but amending it as follows:

1. Change title to read "Section 73.123—Personal Attacks; Political Editorials; Obligation to Encourage the Discussion of Controversial Issues."

2. Add a new paragraph as follows:

"Nothing in the foregoing rule shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries,

and on-the-spot coverage of news events, from the obligation imposed upon them under the Communications Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

Respectfully submitted,

/s/ ROBERT J. CONNERTON
Robert J. Connerton
General Counsel
Laborers' International Union
of North America, AFL-CIO
905 Sixteenth Street, N.W.
Washington, D. C. 20006

May 1966

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29 **Statement to the FCC on the Proposed Rule on Personal Attacks and Political Editorials From Hallock Hoffman, President of the Pacifica Foundation**

June 15, 1966

To: The Federal Communications Commission

The Pacifica Foundation, as owner and operator of three non-commercial radio stations, is grateful for the opportunity to comment on the proposed rule, under the existing "fairness doctrine," in respect to the obligations of licensees of the Federal Communications Commission in cases of attack on persons and in cases of the endorsement or opposition to the candidacy of a legally qualified candidate for public office.

THE PACIFICA FOUNDATION SUPPORTS THE FAIRNESS DOCTRINE

On its face the fairness doctrine is reasonable. No one argues against fairness, and therefore every broadcaster

ought to support the fairness doctrine if it actually achieves fairness. Arguments against the doctrine might once have been based on some notion of illegality or unconstitutionality of the doctrine, as exceeding the powers of the FCC or the government; or as improperly invading the rights of licensees. This line of argument is now dead. The constitutional status of the FCC and the government in respect to regulation of broadcasting has been firmly established. The differences between broadcasting and other forms of public affairs communications, like newspapers, are generally admitted—despite ritualistic outcries from time to time by leaders of the broadcasting "industry"—and most sensible people recognize that broadcasting must be regulated even to exist. Further, it is becoming clear from a line of cases before the Supreme Court, under the general theme of "state action," that broadcasters may be regarded as exercising governmental power through grant of licenses, and have therefore some of the obligations of government to treat those who seek their services without improper discrimination.

Broadcasters as federal licensees are franchised to use a communication medium that has to be under public control; the FCC, as agent of the government charged with allocating the right to use the limited frequencies to some and not to others, must regulate the licensees in the general interest of the public. No argument against the fairness doctrine can be made on the basis of legal or constitutional principle. Any argument against the doctrine, and especially against the proposed rules in respect to personal attacks or political editorials, must therefore be on practical grounds. It is Pacifica's belief that the burdens imposed by the proposed rules are not too heavy, that the purpose served by the rules is worth the cost in administration, attention and air time, and that the rules should be adopted.

THE FAIRNESS DOCTRINE IS PRACTICABLE

I do not mean to discount the cost of conducting a broadcasting station under these rules. The Pacifica stations are not typical, since our costs do not include those of the commercial broadcasters who must give away air time they might otherwise sell to comply with the rule. Our
31 costs, however, are severe. We are small; we have to raise as donations every dollar we spend; we have to skimp merely to survive; and we have to operate with short and often overworked staffs. Our interests are broad, and we devote a large share of our broadcast time to "public affairs" programs, as contrasted to the records and wire-service newscasts that make up the bulk of the broadcast day for many smaller commercial stations. As a result, our exposure to the operation of the fairness doctrine and the proposed rules is greater than that of the average radio station, and we spend a good deal of our limited resources trying to increase that exposure. The idea of Pacifica is the idea of free and open discussion, which leads inevitably to comments and views that seem to be "personal attacks" by those they refer to. The idea of Pacifica is the idea of freedom, and the idea of freedom encourages program participants to say what they might not say on other stations. It is our policy to inquire into the dark corners of our society, where the sacred cows are stabled. This policy often raises controversy and causes conflict. Pacifica is, therefore, well aware of the practical difficulties associated with the proposed rules. We know what we are getting into—we have tried to conduct our affairs in accord with the principles served by these rules in the past. We support the proposed rules from experience, as practicable, right and reasonable.

PACIFICA OPPOSES THE EXCLUSION OF FOREIGN GROUPS AND LEADERS FROM THE FAIRNESS DOCTRINE

We do object to the exclusion in section (b) of the proposed rule, which relieves the broadcaster of obligation

toward "foreign groups or foreign public figures . . ." I understand the reason for the exclusion: it may usually be difficult and sometimes impossible to find a spokesman for such groups and figures, to reply to charges made against them. The effect of the exclusion, however, is to license the cold war and the flaunting of national prejudice, and to encourage the lying and distortion that goes with them.

I believe our Republic would be better served by a modification of the obligations of section (a), rather than voiding those obligations. It might be possible, for example, to require that, as to foreign groups and foreign public figures, broadcasters make available air time for rebuttal or reply to (but not seek out) representatives of parties or groups in this country who defend the foreign groups or figures. The citizens of this country would have been spared a lot of nonsense and perhaps even a number of dangerous misconceptions if broadcasters had been obliged to make speakers on their stations answerable for their attacks on foreign governments and leaders.

The Rule for Editorials Is Sound

Since Pacifica is a non-profit educational foundation, we do not endorse or oppose candidates for public office, and it is against our policy to editorialize on any topic. We support section (c) of the proposed rule, however, as the only reasonable way to assure fairness when radio stations do broadcast political editorials in their own behalf.

Comments on the General Application of the Fairness Doctrine

I now presume upon this opportunity to make an additional comment on the fairness doctrine in its general application beyond cases of personal attack and political editorials.

The problem with the fairness doctrine in the past, in my judgment, has been that it was not enforced. The pro-

posed rules clarify the positive obligation of broadcasters to seek out those who have a claim to the right to rebut broadcast statements. The new rule will also fall heavily on the conscientious (as has the doctrine in the past) and lightly on those who take lightly their obligations as licensees unless it is enforced. One problem with enforcement is that the sanctions available to the FCC have been too limited. Refusing to renew a license or to give a full-term license to a broadcaster for violations of the fairness doctrine is too harsh a penalty for the violation; as one result, there is little conviction in the industry that the FCC will impose any penalty at all on those who flout the doctrine.

This situation could be improved if the FCC adopted a broader and less punitive range of sanctions. Since the problem of policing violations is one of the most difficult in trying to achieve equal application of the fairness doctrine to all licensees, such sanctions might have to depend on the interest and action of those offended. The FCC staff might be reserved for settling cases that could not be settled by the parties. For example, the FCC might adopt a rule requiring that a broadcaster who had violated the fairness doctrine must produce and broadcast a
34 program of merit equal to the offending program, satisfying the cause of the person or group offended. This program would have to be recorded, and the recording made available to the offended party for such other use as it wished. If the offended party did not agree that the program matched the offending program, it could refer the dispute to the FCC for settlement.

The example is offhand, and may not be practical. It is one that we, in Pacifica, would be happy to try to live with. However hard to administer or subject to argument, it does have the advantage of making the licensee seek to repair the damage done. Present sanctions tend only to punish him severely or not at all, without repairing the damage. The cease and desist order, although useful in

fairness cases, also has the disadvantage of making the broadcaster correct his present and future conduct; it does nothing about his past errors. If the requirement of producing and broadcasting an equivalent program is not the way to accomplish the desired result, perhaps a system of fines or of minutes or hours off-the-air during regular broadcast hours might be developed.

A second comment aims at the application of the fairness doctrine to the networks.

The networks are not licensed. The fairness doctrine reaches them only indirectly, by way of individual station licenses. Their stake in the broadcasting industry is such that they ordinarily conduct themselves with remarkable fairness in connection with such matters as personal attacks, political candidates and editorials. What they do not do as well is to deal with the great issues of the age in sufficient depth and rationality.

The FCC could arrange an annual "post-audit," a review of the performance of the networks in connection with controversial issues and public affairs and events. The danger is not that Huntley and Brinkley will attack some individual; it is that neither they, nor NBC, nor any major network, will consistently pursue the job of informing the citizens of the Republic about underlying problems of war and peace, foreign policy, the stock market, the automobile industry, public education, urban blight, minority oppression, or others of the dozens of major problems facing the nation. They do, in a few special hours, devote their talents to some of those matters; when they do, the results are enormously gratifying. Such programs should be encouraged and commended. But there are too few of them; they are not consistent; they provide no base for general judgment by citizens of the state of the world in which they live.

An annual serious public review, to which public comment would be admitted, would call both public and broad-

casters' attention to the facts of their performance. Such hearings might afford an opportunity for station owners to expose the grip in which they are held by the combination of the large advertisers and the networks, which is itself one cause for the overall "unfairness" of the networks' programming allocations.

My proposal as to the networks is to cause them to come annually before the public they are supposed to serve, and set forth their claim to have served it well. Such an annual review could take the place of any enforcement effort designed to make the networks live up to the letter of the fairness doctrine in individual cases. The networks have shown that they are responsible, cautious, and "fair" in the sense covered by the proposed new rules. The
36 FCC could well avoid the troubles of trying to enforce upon the networks what they themselves have long since adopted as their regular practice. It ought instead to see what it can do to get the networks to measure up to a general standard of overall fairness, since that is the trouble the public has with network programmers.

The FCC ought, on the other hand, to enforce the fairness doctrine far more strictly than it has in respect to individual stations in their non-network broadcasts. The fairness of the networks in treating persons and individual issues is not uniformly exhibited by other broadcasters. The problem, as I have acknowledged, is with policing the broadcasters. I think the FCC could identify the irresponsible broadcasters through changed license renewal procedures.

The FCC already requires that stations announce their forthcoming license renewal applications, and solicit comment to the FCC from their audiences. It would be merely an extension of this practice to hold license renewal hearings in the cities where the stations are, rather than in Washington. The FCC should cause the broadcaster to

announce the time and place of such hearings, and should provide a real opportunity to affected members of the public to make their judgments of the stations' performance known. Present renewal procedures do not even bring in many comments; they certainly do not enable the FCC to judge whether, and to what extent, there is citizen satisfaction with the performance of the licensee.

I do not say that the standard of the FCC's judgment should be popularity or financial success. It is the
37 FCC's task to assure diversity and responsibility. It does not do so through its present procedures; it has not the manpower to monitor the performance of licensees; it does not instruct the public about its rights and opportunities to affect the performance of broadcasters. The FCC needs to know whether, over the period of a license, the licensee *has been in general fair*; it ought to raise this question generally, as well as in connection with specific cases.

I believe such an examination before its public would be good for every radio or television station. The statistics are unarguable—most people like what they are getting from the broadcasting industry. However, they have little chance to find out whether they would like something else better, and little chance to tell the broadcasters what they like or want. The FCC could see that the public had a wider choice. It could give the public a chance to report on broadcasting to the broadcaster, whose attention now is directed not toward what people want to hear, but primarily to what will make them buy sponsors' products.

Expanding the Concept of "Fairness"

Finally, I commend to the FCC the proposition that "fairness" is not merely a matter of making certain that each broadcasting station "balances" in some quantifiable

measure, like minutes of air time, what anybody says on a particular issue at a particular time on that particular broadcasting station. Pacifica has long held to the view that fairness obliges it to seek out and present those views rarely heard by the public. We make a practice of broadcasting comments by communists, for example, and by members of the radical right (when we can find them) exactly because these views are not heard *at all* on most stations, and we believe it should be possible to hear them at least occasionally. Following this line of thought leads to the conclusion that, in an area where there are many broadcasting outlets, each might serve the "general fairness" by covering a part, not the whole, of the range of opinion on matters of public import. This would mean that the FCC, in considering new license applications, would be obliged to take into account what citizens of the area could already hear; it would also incline the FCC not to issue additional licenses for stations proposing to duplicate whatever was already widely available.

I recognize the thorny issues of public policy and judgment raised by this notion. I cannot permit the moment to pass, however, without asking the FCC to think a little about the whole of the public and the place of individual broadcasters in serving the whole public. It seems to me that the FCC lets itself be confounded by the narrowness of its vision when it examines a single licensee and the operation of his single station without regard for the other broadcasting services within the context of which the signals from that station are emitted. The post-audit public hearing, in the place where the licensee operates, is one means of bringing this context to the addition of the FCC at a time when it might properly affect its judgment.

42 **Comments of WIBC, Inc.**

WIBC, Inc., by its attorneys, respectfully submits herewith its comments in response to the Notice of Proposed Rule Making in the above-captioned proceeding, released on April 8, 1966. WIBC, Inc. is the licensee of Stations WIBC and WIBC-FM, Indianapolis, Indiana and Station WAII-TV, Atlanta, Georgia.

WIBC, Inc. opposes the adoption of the rules proposed in the above-captioned proceeding. The Commission has not demonstrated any need for such rules, and WIBC, Inc. believes that not only is there an absence of need, but that the "fairness" area is one in which no specific rules should be set forth.

Operation in accordance with the principles of the fairness doctrine involves, as indeed the Commission recognizes, the exercise of a great deal of discretion by the individual licensee. The licensee should not be unduly restricted by a set of specific regulations which do not, as they can-
43 not, provide specific solutions to specific problems but do deprive it of the full use of its discretion in solving such problems.

WIBC, Inc. therefore respectfully urges that the above-captioned rule making proceeding be terminated without the adoption of any rules concerning "fairness doctrine" procedures.

Respectfully submitted,

WIBC, INC.

By HALEY, BADER & POTTS
/s/ ANDREW G. HALEY
Andrew G. Haley
/s/ LOIS P. SIEGEL
Lois P. Siegel
Its Attorneys

June 20, 1966

1735 DeSales Street, N. W.
Washington, D. C. 20036

45 **Comments of Storer Broadcasting Company**

Storer Broadcasting Company, by its attorney, herewith submits the following comments in the above-styled proceeding.

1. The Notice of Rule Making proposes to adopt rules codifying the "personal attack" portion of the fairness doctrine and the procedures to be used in the case of editorials endorsing or opposing legally qualified candidates.

2. According to the Notice:

> "Two important purposes will be served by such codifications. First, it will emphasize and make more precise licensee obligation in this important area. Second, it will assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed."

3. It is the opinion of Storer Broadcasting Company that a proposal such as this will inhibit the use of broadcasting for the airing of controversial issues discussions, and thus will work at cross-purposes with the alleged objective of the fairness doctrine itself.

4. In an area such as that encompassed by the fairness doctrine, the Commission must guard against estab-
46 lishing inflexible "penal" provisions; it should follow its own oft-repeated affirmation of the need for responsible licensee flexibility of judgment. Yet the proposed rules are little more than procedural devices upon which to base fines and forfeitures, and they are inflexible. Storer agrees with NAB and the other commentators in this proceeding who point out that police court procedures and police court atmospheres are not appropriate to the subject matter here involved, from the standpoint of con-

stitutional policy and also from the standpoint of administration—at the government *and* station level. While it is true that the Congress only recently gave the Commission the authority to assess fines and forfeitures for violations of its rules, it is doubtful that Congress contemplated the adoption of rules under which a government agency would determine *what* speech is fair and *whose* speech is fair, while holding the threat of immediate penalty over the remainder.

5. In granting renewal of license to Station KTYM, Inglewood, California, the Commission only three days ago stated:

> "To require every licensee to defend his decision to present any controversial program that has been complained of in a renewal hearing would cause most—if not all—licensees to refuse to broadcast any program that was potentially controversial or offensive to any substantive group. More often than not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views." (Mimeo 85496, June 17, 1966)

It is difficult to see how this same result—suppression of controversial viewpoint broadcasts—could be avoided if the Commission were to adopt the instant proposal, which contemplates close federal supervision of the licensee's judgment and swift and sure punishment if he cannot successfully defend his judgments against "today's" official notion of what is fair.[1] The only sure way out of this dilemma would be for the broadcaster to avoid controversial matter entirely.

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[1] It is the history of communications censorship, of course, that the prevailing notion of today is more often than not the rejected notion of tomorrow.

Comments of the National Association of Broadcasters

6. For these reasons it is submitted that any proposal to codify and police "fairness" would be inappropriate, and that the instant proposal should be withdrawn.

Respectfully submitted,

STORER BROADCASTING COMPANY

By /s/ WARREN C. ZWICKY
Warren C. Zwicky
Vice President and
Washington Counsel

711 Madison Building
1155 - 15th Street, N. W.
Washington, D. C. 20005

June 20, 1966

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48 **Comments of the National Association of Broadcasters**

On April 8, 1966, the Commission released a Notice of Proposed Rule Making in the above-entitled proceeding seeking codification into rules of its current policies pertaining to personal attacks and editorials in support of or in opposition to a legally-qualified political candidate.

The Commission states its action is for two purposes: "First, it will emphasize and make more precise licensee obligation in this important area. Second, it will assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed."

At the outset, it should be recognized that the proposed rules may not be isolated from the rest of the fairness doctrine. If the entire doctrine itself cannot be sustained as a proper instrument of government policy, then the rules themselves, as an integral part thereof, must also fail.

Thus, the question is whether, both in concept and operation, the fairness doctrine encourages communication of controversial matters, promotes the communication
49 of unpopular as well as popular views and otherwise serves the objective of a fully-informed society. In our view, it does none of these. It discourages communication of controversial matters, restrains the vigorous debate of controversial questions and keeps serious issues beneath the surface of community attention. Therefore, it cannot be sustained because not only can it not increase the knowledge of the public, but actually operates in the opposite direction.

I. History of the Fairness Doctrine

The genesis of the fairness doctrine is said by the Commission to be contained in the public interest standards of the Radio Act of 1927. As early as 1929 the Federal Radio Commission stated in its Third Annual Report:

> "It would not be fair, indeed it would not be good service to the public to allow a one-sided presentation of political issues of a campaign. Insofar as the program consists of discussion of public questions, public interest requires ample play for the fair and free competition of opposing views, and the Commission believes that the principle applies not only to addresses of political candidates, but to discussion of issues of importance to the public.[1]

This moral obligation to be fair and to avoid bias was accepted by broadcasters from the very beginning. However, in 1941 we find that the moral obligation is being transmuted into a legal one. The Commission, by dicta, in an unreviewable order, imposed a ban upon broadcast

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1 3 FRC Annual Report.

editorials that was to last until 1949. In its May-
50 flower decision the Commission wrote:

> Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate.[2]

This situation continued until 1949 when the Commission, following lengthy hearings, issued a detailed report in which it confirmed the right of broadcasters to editorialize. At the same time, however, it stated that the general public interest standard of the Communications Act required a licensee to (1) devote a reasonable amount of broadcast time to the discussion and consideration of controversial issues of public importance; and (2) that in doing so, he be fair—that is he affirmatively endeavor to make his facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented.[3]

Thus, the Commission assumed the right to condition the presentation of controversy upon the obligation to be fair. One can hardly envision the uproar that would result if the Post Office Department attempted to require the
New York Times, the Washington Post or the Chi-
51 cago Tribune to present, under threat of legal sanction, the other side as a condition precedent to taking a position on any controversial subject. Yet this is pre-

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[2] Mayflower Broadcasting Corp., 3 FCC 333, 340 (1941).

[3] 13 FCC 1246, 1249, 1252 (1949).

cisely the burden the Commission imposed upon broadcasters.

The next significant event in the chain came in 1959 when the Congress passed an amendment to Section 315 of the Communications Act exempting certain types of programming from the equal opportunities requirements of the section. It stated, in part:

> "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligations imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.[4]

By this time, the curious combination of factors that had permitted the doctrine to go unchallenged had also caused it to become so entrenched as to have its validity go unquestioned at both the administrative and congressional level.

Following the 1959 amendment, the Commission continued to apply the fairness doctrine on an *ad hoc* basis. Then in 1963 it saw fit to send to all licensees a Public Notice in which it called attention to three situations, one of which involved a licensee's obligations when a personal attack was broadcast:

52 "(a) When a controversial program involves a personal attack upon an individual or organization, the licensee must transmit the text of the broadcast to the person or group attacked, wherever located, either prior to or at the time of the broadcast, with a specific

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[4] 73 Stat. 557 (1959), 47 U.S.C. Sec. 315 (a).

offer of his station's facilities, for an adequate response."[5]

Now the Commission proposes to take this situation out of the policy area and adopt specific rules enforceable not only through revocation proceedings, but also through the use of the power to levy forfeitures.

What the Commission ignores is the fact that broadcasters agree they should be fair. The only area of disagreement is whether the obligation is a legal or moral one. The Government has always assumed it to be legal and, therefore, the power to apply sanctions in the event the vagaries of fairness are not met. And so, from an uncertain and ambiguous origin we see the fairness doctrine merge into an unquestioned position as basic regulatory philosophy.

In view of this, it might be well, as Professor John P. Sullivan of the George Washington University Law School suggests, to "test the validity of the reasons given for the rule in the decades past. Perhaps broadcasting is, as Professor Chafee stated, different. Perhaps licensing, or physical limitation, or the fact that the ether is in the public domain (if this latter concept has any meaning) breaks down the newspaper analogy, but the first
53 amendment ramifications alone justify another long look and more than a little renewed reflection."[6]

II. The Fairness Doctrine Constitutes an Abridgement of the Right of Free Speech.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting

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[5] 25 Pike & Fischer, RR 1899.

[6] Editorials and Controversy: the Broadcaster's Dilemma, 32 G.W. Law Review 719 (April, 1964).

the free exercise thereof; or *abridging* the freedom of speech, or of the press . . ." (emphasis supplied)

We think it significant that the word used in the Constitution is "abridge" rather than "censor." Censorship connotes the suppressing of a particular communication or deleting part of its contents, a prior restraint as it were. The word "abridgement," however, has a broader connotation. It means a dimunition, lessening or reduction. In other words, neither Congress nor its creature, the FCC, may diminish, lessen or reduce the right of free communication.

This is precisely the net result of the fairness doctrine. It discourages the use of broadcasting for the expression of opinion and thus abridges the right of the broadcaster as a communicator.

Historically, there are several limitations on speech that have been held not to violate the First Amendment. First, there are those which find their constitutionality in history and tradition, such as the common law of
54 defamation. Second, there are the prohibitions of speech which are offensive to the basic mores of our society, such as obscenity, profanity and the circulation of information about lotteries. Third, there are those limitations which prohibit the use of speech as a part of or as an incident to a prohibited course of conduct, such as disturbance of the peace, false advertising, and injury to the public health. Fourth, there are those limitations which prohibit words which are "used in such cimsumstances and of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[7]

While conceivably a single program or an editorial might fall within one of the above, broadcasting per se does not

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[7] *Schenck* v. *United States*, 249 U.S. 47, 52.

defame, is not offensive to the basic mores of our society, is not injurious to the public health, and does not present a clear and present danger.

Let us now consider the arguments which are usually made to justify the abridgement of freedom of speech by means of radio. One argument that finds favor is that broadcasting is different. Of course, broadcasting is different. It is different from the press. It is different from speech. But there is nothing in the First Amendment which says that because one medium is different from the other it loses its status as one of the fundamental freedoms.

55 Another favorite argument is that there is a limited number of frequencies available for broadcasting. The facts do not justify such an argument. There are today far more frequencies available than we had any idea of when we first began to regulate broadcasting. It is common knowledge that broadcasting stations outnumber daily newspapers by almost four to one.

Apart from this, however, there is nothing in the First Amendment which says that it is proper to abridge freedom of speech because of scarcity, whether it be a scarcity of public halls, of soap boxes, or churches, or printing presses, or newsprint. As a matter of fact, we are warned by conservationists that the supply of timber is being rapidly exhausted and we may have an acute shortage of newsprint in the not too distant future. Will this justify a fairness doctrine for newspapers?

Finally, it is said that the people own the airways and broadcasters operate in the public domain. Therefore, since private persons can be prohibited from using the spectrum, their privilege to use it can be conditioned in any way that Congress or the FCC, in their own discretion, deem desirable.

It is axiomatic that the power of government to grant or withhold a privilege does not carry with it power to bargain with a citizen for the surrender of his constitutional rights, the exercise of which can be directly or indirectly forbidden. This principle was set forth in clear and unequivocal language by Justice Brennan in *Sherbert* v. *Verner*.[8] "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

In sum, it is clear that even though it be said that Congress merely extends a privilege which it is free to withhold—access to a microphone in the public domain—it nevertheless may not exact for that privilege the surrender of the right to freedom of speech. Assuming that the Constitution no more guarantees the private use of a microphone than it guarantees the private use of government buildings, once that use is permitted, the constitutional rights attach to and govern it. Indeed, if anything, the assumption that the Government has absolute discretion to refuse the private use of a means of communication makes it more than ever necessary that the constitutional rights be given the broadest reach.

III. The Fairness Doctrine Discourages Communication of Controversial Matters

By its very nature, any government regulation is restrictive to some degree. A rule or policy seeking to promote "free and open discussion" is no exception. It is one thing to acknowledge that an individual is "fair" to all parties with whom he deals. It is quite another to decree, by federal fiat, what conduct is considered "fair" and what is "unfair." This distinction is especially important

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[8] 347 U.S. 398 (1963).

in maintaining a continuing public dialogue on the important issues of the day. Yet, such a presentation is greatly inhibited by enforcement of the fairness doctrine.

When a broadcaster is faced with sanctions for
57 violating an amorphous policy or rule, he will weigh his actions in the regulated area with great circumspection. This may be a good result in situations conducive to regulation, but, as previously stated, in the realm of First Amendment rights, freedom from restriction is paramount. This freedom is the very essence of the atmosphere necessary for the open discussion of issues that the Commission seeks to preserve.

The basic problem with a legal concept of a fairness doctrine is that it has the effect of discouraging the use of broadcasting for expression of opinion. There is a basic inconsistency in a policy that encourages the voicing of controversy on the air while at the same time making it clear that the execution of fairness will be closely supervised. The mere idea of supervision in this area will discourage many broadcasters. Strict ground rules, such as proposed herein, will discourage more. The result will be the antithesis of what the rules hope to accomplish.

The existence of an obligation implies the existence of a sanction. However, not every obligation requires the same type of a sanction and, therefore, there must be a clear determination of the type of obligation before an appropriate sanction can be applied.

If a legal obligation exists, the Commission must examine the substance of the material broadcast; consider whether the subject matter is controversial or, in the case of the proposed rules, involves a personal attack; weigh what is given to each side; test the format for inherent fair-
58 ness; determine whether proper notice was given; and then tell the licensee he was either right or

wrong. This is the type of administrative fiat that has been the classic tool of censors from the beginning of communications. It involves judgments which just cannot be made by a government agency without inviting the evils of censorship. The establishment of such an obligation to be fair does nothing in our opinion to encourage the presentation of important public issues.

It must be remembered that the only means by which the broadcaster can obtain sufficient revenues to properly serve the public is through the sale of time. If the proposed rules were adopted, he would be forced to give away this product for a reply to a statement made over his facilities. If he did not do so, he would be subject to a forfeiture, a possible revocation of license, or, and this is entirely possible under the proposed rule, both. In short, he would be faced with the alternative of presenting all responsible sides under threat of government sanction or of not taking chances and avoiding all such presentations. This Hobson's Choice is sufficient to make broadcasters chary of committing any appreciable amount of time to the presentation of unpopular views or highly controversial subjects.

Perhaps the most invidious result of the fairness doctrine is that broadcasters are forced to do what the Constitution prohibits government from doing: acting in a manner that is tantamount to censorship. It is true that a licensee is responsible for everything that is transmitted over
59 his facilities, with the exception of statements made by a legally-qualified candidate. It is also true that the First Amendment is not absolute, and in certain carefully delineated areas, the freedom to speak is proscribed. It is the broadcaster's duty to prevent those utterances that are not given Constitutional protection. But he should not be forced to act in a manner which, directly or indirectly, tends to discourage the fullest exercise of free speech by others over his facilities. Government cannot interfere in this area and the fairness doctrine is not made

Constitutional by requiring broadcasters, under fear of sanctions, to act as censors.

Few would disagree with the objectives of the fairness doctrine, at least as applied to the media of mass communications. The vice, however, is that a government agency determines what is fair and what punishment shall be meted out to those judged unfair. When there is an end result that must be achieved at a licensee's peril, then a leverage is available to government that can induce conformity with certain preconceived ideas; and while it may not be deliberate or conscious, this does not make the result any less certain or more palatable. What in most businesses is a constitutional right to continue an honorable calling can become, because of a license system a mere privilege to be dispensed periodically to those who sustain successfully the burden of proving conformity with whatever standards of conduct the dispenser of the privilege may espouse.

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Conclusion

In all men of good will there is a drive to improve the world of which they are a part. That drive found a unique expression in this country in the establishment of our form of government, a government to which was granted certain specified powers and to which was forbidden by the Bill of Rights certain acts that might have been taken under those powers. It was delegated the power to regulate interstate commerce. It was forbidden the power to abridge freedom of speech. As the technology of the nation grew, so did the application of the Congressional reach to regulate commerce. In the 1920's radio communications had developed to the point that its regulation by the federal government as a species of interstate commerce became necessary for technical reasons.

Those who fashioned that regulatory framework established that public interest, convenience and necessity were

to be the tests under which licenses would be granted to communicate by radio broadcasting. At the same time it is clear that they wished to preserve the concept of freedom embraced within the First Amendment. So that there could be no doubt as to their intent, a specific provision was incorporated within the Act forbidding the Commission to censor or to pass or to promulgate or to fix any regulation or condition which interferes with free speech by means of radio communications. They left to the predecessors of this Commission and to this Commission the workable reconciliation between the injunction against interference with free speech and the power to regulate radio.

61 To the man who impatiently seeks the perfect world in his lifetime, wisdom has cautioned restraint lest when in a position of power he should set himself up as the arbiter over what may be transmitted and received in the flow of communications. It is not enough to be well-meaning. In fact, good intentions on the part of an encroaching authority may well be more dangerous than bad ones. Justice Brandeis put it this way: "Experience should teach us to be more on our guard to protect liberty where the government's purposes are beneficient."

In view of the above, the Association respectfully requests that the instant rule making be withdrawn and that broadcasters like other communicators be permitted to present one side or all sides from case to case as their expert judgment of the exigencies dictates.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
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/s/ DOUGLAS A. ANELLO
Douglas A. Anello
General Counsel

June 20, 1966

62 **Comments of Mutual Broadcasting System, Inc.**

MUTUAL BROADCASTING SYSTEM, INC. (hereinafter referred to as "Mutual"), by its attorneys, hereby respectfully submits the following comments on the Commission's "Notice of Proposed Rule Making", in the above-captioned proceeding:

I. INTRODUCTORY

1. Mutual operates a national radio network to which are affiliated over 500 radio stations throughout the United States. Over 200 newscasts a week, plus a wide variety of programs of news commentary, public affairs and discussion programs are made available to affiliated stations through the network facilities of Mutual. Moreover, Mutual also provides its affiliates with on-the-spot, de-
63 tailed coverage of special events, such as Presidential news conferences, manned space flights, national political conventions, and election news coverage. Mutual's comments herein will be directed principally to those matters which have a direct bearing on its network operations, including its relations with its affiliates.

II. THE PROPOSED AMENDMENT TO SECTION 73.123 OF THE RULES IS IMPROPER AND UNWARRANTED

2. The Commission is here attempting to spell out, by rule, a licensee's obligations where, in the course of a program dealing with a controversial issue of public importance, a personal attack is made upon a person or group. To this end, the Commission seeks to formally codify the "personal attack principle" now embodied in its Fairness Doctrine. At the same time, the Commission also proposes to implement, by a specific rule, its pronouncements dealing with station editorials endorsing or opposing political candidates. Mutual is opposed to both proposed actions.

3. First, Mutual submits that the proposed amendments to Section 73.123 of the Rules represents an encroachment by the Commission upon the fundamental and exclu-
64 sive right of broadcasters to determine the content of their programming and the manner of presentation

thereof. For this reason, Mutual believes that grave Constitutional questions are presented by the proposed actions. (See Section 326 of the Communications Act.)

4. Secondly, the very proposal for such rules implies that broadcasters cannot be trusted to be "fair" in their presentation of controversial issues of public importance. Yet the paucity of cases dealing with the problem of concern herein establishes that Commission licensees do desire to be fair and have been fair, even in the absence of a published rule requiring the same. Hence, in Mutual's view, the proposed rules are unnecessary.

5. Thirdly, for all practical purposes, the proposed rules will discourage, rather than encourage, controversial programming and will promote bland, mediocre programming by licensees. Surely, if a broadcaster is in doubt as to whether or not the proposed rules will be applicable to a particular factual situation, and knows that his ultimate judgment on this might eventually be questioned, he will be inhibited, or will shy away from presenting controversial or provocative programming. Certainly such a result would not be consistent with the public interest.

65 III. The Text of the Proposed Rule

6. The proposed rules are vague insofar as they set forth no concrete standard as to what constitutes a "personal attack". Hence, they place an unfair, and probably an unconstitutional burden, upon the licensee.

7. If, despite the foregoing, the Commission adopts rules such as those proposed, it is requested that certain additional provisions be incorporated therein to take cognizance of the fact that some programming involving personal attacks may originate with a network, rather than with a particular station.

8. Where the attack is contained in a network program, Mutual believes that each one of the hundreds of stations carrying that program should not be required to transmit

a separate copy of the script or tape of the program to the person or group attacked. Instead, the network alone, should bear the responsibility for providing the copy of the script or tape. Moreover, the rules (if adopted) should provide that under such circumstances, the obligation to provide reply time to a person or group which has been attacked on a network program should properly devolve upon the network. The rules could require that if a station carried the original program containing the attack, it would be obligated to clear time for the network program containing the reply. In this latter connection, it must be recognized that not all Mutual affiliated stations carry all of its programs. Hence, machinery should be incorporated within the rules under which the network would notify its affiliated stations of the time being offered for reply purposes, thus providing the station with an opportunity to determine whether it is or is not obligated to carry the same. Absent some such provision, some stations might carry the reply which did not carry the original attack from its network.

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9. The very complexity of the problem of network-station relations in this area is another reason why it is neither feasible nor desirable for the Commission to attempt to incorporate into its published rules its so-called "Fairness Doctrine".

Respectfully submitted,

MUTUAL BROADCASTING SYSTEM, INC.

By /s/ JACK P. BLUME
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June 20, 1966

67 **Comments of Interstate Broadcasting Company**

Interstate Broadcasting Company, licensee of Stations WQXR and WQXR-FM, New York City, New York (hereinafter called Interstate), by its attorneys, respectfully submits these Comments, pursuant to the provisions of Section 1.415 of the Rules, with respect to the Commission's above-captioned rule-making proposal.

1. Interstate's interest in this proceeding relates, because of practical considerations, to the content of subparagraph (c) of the proposed rules relating to licensee endorsement of and opposition to candidates for public office. Interstate believes that adoption of the subparagraph (c) proposal would bring about a reduction in public service programming without any counterbalancing
68 benefit and that the fairness doctrine itself insures the aim sought to be achieved by the Commission without the necessity for rigid and unworkable requirements. Finally, by way of introduction, if the Commission finds it necessary to adopt specific rules dealing with licensee political editorials, such rules should be limited to situations where a licensee engages in an attack upon the "honesty, character, integrity or like personal qualities" of a candidate for public office.

2. Both the Commission and the broadcast industry have long recognized an obligation on the part of the broadcaster to be fair. The 1929 Annual Report of the predecessor Federal Radio Commission, for example, contained the following statement:

> "It would not be fair, indeed it would not be good service to the public to allow a one-sided presentation of political issues of a campaign. Insofar as the program consists of discussion of public questions, public interest requires ample play for the fair and free competition of opposing views, and the Commission

believes that the principle applies not only to addresses of political candidates but to discussion of issues of national importance."

And in 1939 the NAB Code provided that stations shall provide for the presentation of questions of public concern, including those of a controversial nature. In doing so, the Code specified that broadcasters should allot time "with fairness to all elements in a given controversy."

69 3. Although the industry itself, even apart from Commission pronouncements, recognized an obligation on the broadcaster to be "fair," the Commission apparently believed that special treatment was needed where the broadcaster had his own views on the merits of the controversial issue of public importance. Thus, in 1940 the Commission announced the *Mayflower* doctrine:

> "A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate." *Mayflower Broadcasting Corp.*, 8 FCC 333 at 340.

The Commission, in effect, imposed by its *Mayflower* decision, an absolute ban on editorializing by its licensees with respect both to candidates for public office and other controversial issues of public importance.[1]

4. Owing to increasing broadcaster agitation against the editorial restriction imposed by *Mayflower*, however, the Commission undertook a reevaluation of the doctrine and,

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[1] In fairness to the Commission, it should be noted that at the time of the *Mayflower* decision many broadcasters agreed that a licensee should not editorialize over its facilities. In fact, the 1939 NAB Code contained what could be construed as a prohibition against editorial expression by licensees.

in 1949, issued its *Report on Editorializing,* 25 Pike
70 & Fischer RR 1901. By the *Report* the Commission retreated from the doctrine which it had espoused in *Mayflower,* and found no reason why broadcasters should not be extended the privilege of editorial voice subject always, of course, to the requirement of being "fair":

> "But where the licensee, himself, believes strongly that one side of a controversial issue is correct and should prevail, prohibition of his expression of such position will not of itself insure fair presentation of that issue over his station's facilities, nor would open advocacy necessarily prevent an overall fair presentation of the subject. It is not a sufficient answer to state that a licensee *should* occupy the position of an impartial umpire, where the licensee is *in fact* partial. In the absence of a duty to present all sides of controversial issues, overt editorialization by station licensees could conceivably result in serious abuse. But where, as we believe to be the case under the Communications Act, such a responsibility for a fair and balanced presentation of controversial public issues exists, we cannot see how the open espousal of one point of view by the licensee should necessarily prevent him from affording a fair opportunity for the presentation of contrary positions or make more difficult the enforcement of the statutory standard of fairness upon any licensee." *Report on Editorializing,* 25 Pike & Fischer RR 1901 at 1909-10.

Interstate thinks it fair to state that since the release of the *Report on Editorializing* the Commission has, and most particularly in recent years, actually encouraged,
71 through the various means at its disposal, editorialization by its licensees.[1] Interstate fears, however,

[1] See, for example, Address of Newton Minow before the National Association of Broadcasters, May 10, 1961.

that adoption of the rules proposed herein may result in an effective return to the *Mayflower* doctrine.

5. Interstate does not disagree with the aims sought to be accomplished by the Commission's fairness doctrine, and, correspondingly, by the rules proposed herein. As a broadcaster it readily admits to an obligation to insure a fair presentation of all responsible views on issues of public importance.[2] Similarly, the procedures reflected by subparagraph (a) of the proposal dealing with attacks upon the "honesty, character, integrity or like personal
72 qualities of an identified person or group" should be followed, as Interstate does, by broadcasters in order to protect the public and insure fairness. Interstate cannot, however, agree that there is any merit in the subparagraph (c) proposal which would eliminate virtually all licensee discretion when it editorializes in favor of or in opposition to a legally qualified candidate.

6. In reiterating the obligation of the broadcaster to be fair in the *Report on Editorializing*, the Commission there, and in numerous subsequent rulings, emphasized that this is an area for substantial licensee discretion. Perhaps, the Commission's best statement of this philosophy is contained in the *Report* itself wherein the Commission asserted:

> "[T]here can be no all embracing formula which licensees can hope to apply to insure the fair and

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2 Interstate does not, however, necessarily agree with the Commission that the obligation to be fair is appropriately considered a *legal* obligation. See, for example, Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 George Wash. L. Rev. 719 (1964). Interstate realizes that at this late date the Commission will not decline to adopt rules on "First Amendment" grounds. At least as early as 1940, the Commission announced its belief that the obligation of a broadcaster to be fair is a "legal requirement," 6 FCC Annual Reports 55. The legal position of those advocating the unconstitutionality of a Commission-enforced fairness doctrine has been often stated (as in Mr. Sullivan's article cited above). For these reasons Interstate does not propose to engage in a dissertation on this point.

balanced presentation of all public issues . . . . The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesman for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as to whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or
73 whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request . . . . " 25 Pike & Fischer RR at 1907.

7. With all due respect, Interstate submits that the Commission is evidencing ambivalence in the extreme by pronouncements such as the foregoing recognizing a broad area for licensee discretion in programming as compared with the rule-making proposals herein, particularly subparagraph (c), whereby the Commission would virtually eliminate all semblance of licensee discretion in a particular area of its programs. We also submit that subparagraph (c) of the proposed rules is far from consistent with the Commission's previous encouragement of licensee editorials unless the Commission can accept as palatable (which we cannot) the idea that a government agency has the prerogative to classify certain types of editorials as "good" but others as "bad" and to promote some as "desirable" and others as "undesirable."

8. In effect, subparagraph (c) of the proposed rule says there is only one way to be fair if a broadcaster editorial-

izes with respect to candidates for public office. In paragraph 7 of the Notice the Commission does assert that the rule is not all-encompassing and that judgments will still have to be made by the licensee. Curiously, however, of the examples advanced by the Commission virtually all are designed to show that a licensee will have to do more than that required by the rule in order to be fair. Interstate submits that a licensee can editorialize with respect to political campaigns and still be fair in presenting the candidates to the public without adherence to the rigid requirements of subparagraph (c). The Commission should trust the broadcasters, the vast majority of which are responsible, with the discretion which has always inhered in fairness doctrine situations.

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9. The Commission must realize that editorials, even in political campaigns, are not to be equated with personal attacks. By the proposed rule even an "endorsement" of candidates in an editorial requires notification and an offer of an opportunity to respond. Such an endorsement, however, will seldom involve any of the aspects of an attack, will seldom vilify or deprecate the unendorsed candidate and frequently will simply indicate a slight preference between two capable men. The Commission has offered no reason, practical or otherwise, why the licensee must send a transcript to unendorsed or opposed candidates with an offer for time to respond even where, as is to be expected, the licensee's programming with respect to the campaign is in conformity with the fairness doctrine.

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10. We fear that the result of such a rule would be a reduction in public service programming. An editorial can be of any effect only if the editorialist has the respect of the public for well-reasoned judgment and, we submit, with perhaps rare exception, only the responsible gain that respect. But a rule such as that proposed would, because

of "logistics" problems, result in editorials simply not being aired.

11. Interstate's stations are located in New York City, New York. For a number of years it has been the policy of Interstate, which is a wholly-owned subsidiary of *The New York Times,* to broadcast editorials. It has done so in the belief that such broadcasting is a service to the public. Further, it has been the policy and practice of Interstate to read on the air certain editorials which are scheduled to appear the following morning in *The New York Times.* The broadcast editorials may deal with local or national issues, or with local or national political campaigns.

12. As one example of the "logistics" problems involved, consideration should be given the large number of United States House of Representatives Districts in the New
76 York City metropolitan area and the considerable number of candidates involved in primary and later elections. *The New York Times* will often use a column of editorial page space designating its preferences in all of these races. Under the proposed rule, if Interstate broadcasts such an editorial, which would be both interesting and helpful to its listeners, it would be subjected to the requirement that all candidates be notified and offered time for a "meaningful response."

13. When this requirement is projected in terms of multiple campaigns in metropolitan markets, the prospects of administration become awesomely formidable. The net result would be that the editorial would not be broadcast and that listeners would be deprived of a respected editorial voice with no corresponding benefits because fairness is already insured by the doctrine itself.

14. Furthermore, when the proposed rule is thought of in terms of the national elections, the result becomes

ludicrous—perhaps more so for a small market station than others, but only to a degree. We submit that it would be absurd to have required a station endorsing President Johnson in the last campaign, be it located in New York City, New York, or Truckee, California, to offer Mr. Goldwater an opportunity specifically to respond or vice
77 versa. Since stations are already committed to a standard of fairness there is simply no reason to retreat to the days of *Mayflower* relegating broadcasters to second-class journalistic status, by such rigid and unworkable requirements.

15. We think some objection should be voiced also to the Commission's assertion at paragraph 7 of its Notice that by subparagraph (c) it is proposing simply to "implement the *Times-Mirror* ruling as to station editorials endorsing or opposing political candidates." What the Commission is in fact doing is seeking to convert dicta from *Times-Mirror,* 24 Pike & Fischer RR 404, into a specific rule which would be applied to factual situations far different from that which existed in *Times-Mirror.*

16. The rules proposed herein cover mere endorsements of candidates as well as personal attacks. In *Times-Mirror,* however, an aggravated factual situation was presented. There, the licensee permitted the use of its facilities by two broadcast commentators who were given to repeated and rather harsh personal attacks upon political candidates and who could not have been considered "responsible spokesmen" for any side of a particular issue involved. Clearly, personal attacks were present and while perhaps any editorial favoring or opposing a political candi-
78 date might be said to be within the purview of dicta in the *Times-Mirror* case, we submit that the holding in that case must be considered in light of, and limited to, its own exaggerated factual setting. To assert unilaterally,

as the Commission has, that subparagraph (c) of the proposal is simply an embodiment of the *Times-Mirror* ruling, is, we submit, an unfair presentation on an issue of importance.

17. If the Commission persists in its apparent aim to adopt rules in this area, Interstate believes that it would be far better to limit the requirements of subparagraph (c) to "personal attacks" and, in this regard, Interstate suggests the following:

> "(c) When a licensee, during the presentation of an editorial, endorsing or opposing a legally qualified candidate or candidates for public office, attacks or criticizes by name the ability, qualifications, honesty, character, integrity or like personal qualities of a legally qualified candidate or candidates for public office, the licensee shall, within 24 hours after the presentation of the editorial, transmit to the candidate or candidates so attacked or criticized (i) a script or tape of the editorial; (ii) notification of the date and the time of the editorial; and (iii) an offer of a reasonable opportunity for the candidate or a spokesman of the candidate to respond over the licensee's facilities."

18. The suggested modification would still impose upon a licensee engaging in a personal attack on a candidate for public office, *procedural* obligations beyond those
79 contained in subparagraph (a). On the other hand, it would entrust to the licensee the good faith discretion which the Commission has always honored in fairness doctrine situations to ensure a fair presentation, where an endorsement or opposition in a political campaign does not constitute an attack upon a candidate's "ability, qualifications, honesty, character, integrity or like personal qualities."

CONCLUSION

WHEREFORE THE PREMISES CONSIDERED, Interstate respectfully urges that the Commission terminate this proceeding without the adoption of rules or, in the alternative, that it adopt the proposed rules only as modified consistent with the suggestions contained herein.

Respectfully submitted,

INTERSTATE BROADCASTING COMPANY

/s/ REED MILLER
Reed Miller

/s/ DAVID H. LLOYD
David H. Lloyd
Arnold & Porter
1229 19th Street, N.W.
Washington, D. C. 20036

June 20, 1966

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81 **Comments of Trigg-Vaughn Stations, Inc.**

Trigg-Vaughn Stations, Inc., by its attorneys, respectfully submits herewith its comments in response to the Notice of Proposed Rule Making in the above-captioned proceeding, released on April 8, 1966. Trigg-Vaughn Stations, Inc., is the licensee of Station KOSA-TV, Odessa, Texas, Stations KROD and KROD-TV, El Paso, Texas, Station KITE, Terrell Hills, Texas and Station KRNO, San Bernardino, California. It is also affiliated in ownership with Station KOSA, Odessa, Texas, Station KHOW, Denver, Colorado and Stations KDEF and KDEF-FM, Albuquerque, New Mexico.

Trigg-Vaughn Stations, Inc., opposes the adoption of the rules proposed in the above-captioned proceeding. The Commission has not demonstrated any need for such rules, and Trigg-Vaughn believes that not only is there an ab-

sence of need, but that the "fairness" area is one in which no specific rules should be set forth.

Operation in accordance with the principles of the fairness doctrine involves, as indeed the Commission
82 recognizes, the exercise of a great deal of discretion by the individual licensee. The licensee should not be unduly restricted by a set of specific regulations which do not, as they cannot, provide specific solutions to specific problems but do deprive it of the full use of its discretion in solving such problems.

Trigg-Vaughn Stations, Inc. therefore respectfully urges that the above-captioned rule making proceeding be terminated without the adoption of any rules concerning "fairness doctrine" procedures.

Respectfully submitted,

TRIGG-VAUGHN STATIONS, INC.

By HALEY, BADER & POTTS

/s/ ANDREW G. HALEY
Andrew G. Haley

/s/ LOIS P. SIEGEL
Lois P. Siegel

Its Attorneys

June 20, 1966

1735 DeSales Street, N. W.
Washington, D. C. 20036

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84 **Comments of Meredith Broadcasting Company**

Meredith Broadcasting Company, by its attorneys, respectfully submits herewith its comments in response to the Notice of Proposed Rule Making in the above captioned proceeding, released on April 8, 1966. Meredith Broadcasting Company is the licensee of Stations KCMO, KCMO-

FM, and KCMO-TV; Kansas City, Missouri and Stations KPHO and KPHO-TV, Phoeniz, Arizona, and is the corporate parent of Stations WOW, WOW-FM and WOW-TV, Omaha, Nebraska, and Stations WHEN and WHEN-TV, Syracuse, New York.

Meredith Broadcasting Company opposes the adoption of the rules proposed in the above-captioned proceeding. The Commission has not demonstrated any need for such rules, and Meredith believes that not only is there an absence of need, but that the "fairness" area is one in which no specific rules should be set forth.

Operation in accordance with the principles of the fairness doctrine involves, as indeed the Commission
85 recognizes, the exercise of a great deal of discretion by the individual licensee. The licensee should not be unduly restricted by a set of specific regulations which do not, as they cannot, provide specific solutions to specific problems but do deprive it of the full use of its discretion in solving such problems.

Meredith therefore respectfully urges that the above captioned rule making proceeding be terminated without the adoption of any rules concerning "fairness doctrine" procedures.

Respectfully submitted,

MEREDITH BROADCASTING COMPANY

By HALEY, BADER & POTTS

/s/ ANDREW G. HALEY
Andrew G. Haley

/s/ LOIS P. SIEGEL
Lois P. Siegel

June 20, 1966 *Its Attorneys*

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86 **Comments of National Broadcasting Company, Inc.**

National Broadcasting Company, Inc. ("NBC") herewith submits its comments on the Commission's proposed rule set forth in the Notice of Proposed Rulemaking in this proceeding ("Notice").

In submitting these comments NBC does not wish to be understood as favoring the Commission's "fairness doctrine", since NBC has serious question as to the principle of governmental intervention in broadcast journalism. NBC agrees that the public should receive a fair representation in discussion of controversial issues of public importance, but NBC does not favor governmental action to enforce such representation by regulations.

87 SUMMARY OF NBC POSITION

NBC is opposed to the rule proposed in the Notice, for the following reasons: (1) the fairness doctrine does not apply to personal attacks as such; (2) no public interest is served by the proposed rule; (3) the proposed rule contravenes standards of fairness heretofore established; and (4) the proposed rule imposes an unreasonable obligation on the licensee.

I. THE FAIRNESS DOCTRINE DOES NOT APPLY TO PERSONAL ATTACKS AS SUCH

The fairness doctrine applies only to the discussion of controversial issues of public importance. This is clear from the proviso to Section 315(a) of the Communications Act, upon which the Commission relies for its authority to adopt the proposed rule, and from the Commission's own definition of the fairness doctrine in paragraph 2 of the Notice. The Commission has itself made the distinction that the fairness doctrine applies to *issues*, not individuals. (Letter of October 10, 1960 to Freedman and Unger).

88 NBC does not believe that a personal attack, even if made during the course of a discussion of a controversial issue of public importance, is necessarily in and of itself a discussion of a controversial issue of public importance. For example, instances in which NBC has been asked by the Commission to comment on complaints of alleged personal attacks have included one in which a governor referred to an individual as a communist and another in which a candidate referred to a named organization as scurrilous. Both comments were made in the course of discussions of controversial issues of public importance, but those issues were not the "character" of the person or organization involved. Neither "attack" could be deemed itself to be a controversial issue of public importance, and in fact in neither case did the Commission rule that the fairness doctrine required time to be given the person or organization "attacked".

The Notice apparently recognizes that it is converting the "fairness doctrine" from its past application to controversial issues of public importance, and applying it to "personal attacks" not necessarily constituting controversial issues of public importance. Thus, although the Rule speaks in terms of personal attacks which occur
89 "during the presentation of views on a controversial issue of public importance", it does not require that the personal attack *itself* be a controversial issue of public importance.

This is not merely a semantic difference. Most "personal attacks"—even those taking place during a discussion of a controversial issue of public importance—do not themselves constitute controversial issues of public importance. It has been NBC's experience that during the course of programs presenting controversial issues of public importance, the names of many public officials and other persons are mentioned, and indeed many of these individuals may themselves be discussed. However, these ref-

erences are only incidental to the substantive issue which constitutes the controversial issue of public importance being discussed and which heretofore has been considered to be the only area subject to the Commission's "fairness doctrine".

It must also be noted that the proposed Rule applies only to those personal attacks which take place during the presentation of views on a controversial issue of public importance. This, of course, does not alter the
90 nature of the attack itself, although it does introduce a further inconsistency—an attack in a variety entertainment show would give rise to no action under the rule, while an attack on a news interview program might.

II. No Public Interest is Served by the Proposed Rule

In its 1949 *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246, and again in its *Fairness Primer,* Public Notice of July 1, 1964 29 Federal Register 10415, the Commission stated the basis of the fairness doctrine:

> "It is this right of the public to be informed, rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system of broadcasting."

The right of the public to be informed is not promoted by requiring a licensee to make time available for reply to a personal attack. Rather, unless there is a controversial issue of public importance involved, the proposed rule would in effect legislate a requirement that the public broadcast channels be used to afford a private remedy for a private wrong for which the remedy at law has sufficed for many years.

91. The Commission, in its *Editorializing Report,* did not suggest any such private remedy. A fair read-

ing of a fuller portion of the *Editorializing Report*, 13 FCC 1246, 1251-52* (1949) than is quoted in paragraph two of the Notice demonstrates that that Report did not consider that an attack on a specific person or group would *itself* constitute a controversial issue of public importance requiring the invocation of the "fairness doctrine". Rather, the fact that a person or group has been specifically attacked over the station was stated as possibly being a factor which must be considered along with such other questions as the subject, the particular format of the programs, and the different shades of opinion to be presented, as part of the station's general consideration of whether to honor a specific request by a particular person or group. It was only in discussing licensee treatment of such a request that the question of personal involvement or "attack" was adverted to in the Report. The full paragraph was as follows:

> "It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues.
>
> 92 "Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a

* Erroneously cited in the Notice as page 1258.

sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist. Undoubtedly, over a period of time some licensees may make honest errors of judgment. But there can be no doubt that any licensee honestly desiring to live up to its obligation to serve the public interest and making a reasonable effort to do so, will be able to achieve a fair and satisfactory resolution of these problems in the light of the specific facts." (13 FCC at 1251-52)

Thus, the Notice quoted half of the sentence referring to "attacks", and constructed on it a wholly different principle than originally intended. Instead of a fairness
93 doctrine issued to serve the public interest in controversial issues of public importance, the Notice proposes a private remedy for individuals and groups, with only a tangential relationship to controversial issues of public importance.

III. The Proposed Rule Contravenes the Standards of Fairness Heretofore Established by the Commission

The Commission has properly made no attempt to codify its concept of the fairness doctrine. Instead, it has outlined in the *Fairness Primer* (29 F.R. 10416) a broad standard of good faith effort by the licensee to be fair in the treatment of controversial issues of public importance:

" . . . . . the licensee, in applying the fairness doctrine, is called upon to make reasonable judgments in

good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming. In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee as to any of the above programming decisions, but rather to determine whether the licensee can be said to have acted reasonably and in good faith. . . . . "

94 The proposed rule completely ignores such a standard, substituting a rigid approach. If a personal attack were made, the licensee would be required to take the specific steps of (1) notifying the person or group attacked of the date, time, and identification of the broadcast on which the attack was made and a script, tape, or summary of the attack; and (2) offering a reasonable opportunity to respond over the licensee's facilities.

Instead of leaving licensees free to determine in what fashion the controversy should be handled, the proposed rule would adopt the personal "equal time" approach previously confined to the special situation of candidates for public office. The only real judgment a licensee would be permitted to make—and that made subject to being "second-guessed" by the Commission—is one whether a personal attack had occurred over his facilities.

Beyond that point, the proposed rule would substitute the Commission's judgment for that of the licensee by imposing on the licensee a rigid standard of conduct determined by the Commission.

95 Similarly, the proposed rule disregards the above-quoted language from the *Editorializing Report*, which spelled out at some length that the licensee need only

act reasonably and in good faith on a request for time to present a point of view on a controversial issue of public importance—in which a personal attack on the requester over the station is a factor to be considered.

IV. The Proposed Rule Imposes An Unreasonable Obligation on the Licensee

The proposed rule would place upon the licensee a greater obligation and a heavier burden than that imposed by the Commission with respect to equal opportunity. Section 73.657(e) of the Commission's Rules requires that a request for equal opportunities be submitted *to* the licensee within one week of the day on which occurred the use for which equal opportunity is claimed. The licensee is not required to take any *affirmative* action—only to pass upon a timely request by the candidate seeking equal opportunities.

96 Furthermore, under the proposed rule, if a personal attack occurred on a licensee's station, the licensee should be required to offer the person attacked a "reasonable opportunity" to reply, even though the attack was a spontaneous utterance as to which the licensee had no advance knowledge.

Hence, not only would the proposed rule charge the licensee with responsibility for attacks which he cannot guard against in advance; by requiring him to *volunteer* time for a reply, rather than await a request, the proposed rule would imperil his license every time he was called upon to decide whether a personal attack had occurred in the presentation of views on a controversial issue of public importance. Depending upon how the Commission were to interpret a "personal attack", the licensee would be faced with the alternative of jeopardizing his license or giving time to a complainant to reply to a spontaneous remark of a critical personal nature; maybe, even, giving time

to the manager of a cellar-dwelling baseball team to assert that he is not, either, a bum.

97 This possibility is not a far-fetched one. The Notice herein stated that the phrase "reasonable opportunity" had been used rather than "comparable opportunity", because the broadcast calling the rule into operation may involve only a few seconds, and reasonable opportunity may call for more than a few seconds if there is to be a meaningful response. (Paragraph 7)

Finally, the proposed rule would require the licensee to offer time for reply to any person or group attacked by a candidate, unless the person or group fell within the category excluded in paragraph (b) of the proposed rule, although the licensee has no power to censor the candidate and no legal liability for any defamation the candidate may utter.

In contrast to these consequences, both the proviso to Section 315(a) of the Communications Act and the Commission's own declaration of the fairness doctrine call only for the licensee to afford reasonable opportunity for the discussion of conflicting views on issues of public importance. The proposed rule is a far cry from one in which the licensee is called upon "to exercise his best judgment and good sense in determining what sub-
98 jects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view". (*Editorializing Report,* paragraph 10)

On the other hand, where a personal attack is broadcast by or at the direction of a licensee, or a licensee editorial presented supporting or opposing specific candidates, considerations of fairness would ordinarily point to the licensee's affording an opportunity for a reply, regardless of

the existence or non-existence of a specific rule on the matter.

V. Other Comments

Paragraph (b) of the proposed rule would make the rule inapplicable to personal attacks by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign. Since NBC opposes the proposed rule in its entirety, NBC is in favor of any exclusions from the proposed rule. However, the exclusion should be
99 phrased more generally. As phrased, it gives rise to the question who is an authorized spokesmen or a person associated with the candidate; the question can be avoided by excluding all attacks "by a legally qualified candidate or his supporters", regardless of upon whom made. Along the same line, paid political programs or announcements should be entirely excluded from the proposed rule.

VI. Conclusion

In view of the foregoing considerations and with the reservation above expressed as to the basic validity of the fairness doctrine, NBC submits that the proposed rule should be rejected and the proceeding terminated, or at most a rule adopted which would apply only to personal attacks broadcast by the licensee or at his direction and to licensee editorials supporting or opposing candidates. If not rejected or restricted as suggested above, the rule (a) should under no circumstances apply to statements in any paid political program or announcement or to any statements by a candidate or his supporters, and (b) should not require the licensee to take affirmative action in offering time for reply, except where the attack has been made
100 by the licensee or at his direction, or in the case of a partisan licensee editorial; and except in either of

the latter situations, the person or group attacked should have a limited time, such as seven days, within which to request time for a reply.

Respectfully submitted,

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June 20, 1966

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102 **Comments of Columbia Broadcasting System, Inc.**

Columbia Broadcasting System, Inc. (CBS) respectfully submits these Comments in response to the Commission's Notice of Proposed Rule Making (Notice) in this proceeding, which looks toward the adoption of rules establishing procedures to "make more precise licensee obligation" in the area of "personal attacks" and certain political editorials and to "assist the Commission in taking effective action in appropriate circumstances where the procedures are not followed." (Par. 3, Notice.)

Comments of Columbia Broadcasting System, Inc.

Section 73.123(a) of the proposed rules would provide that, when, "during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group," the licensee must furnish to such person or group a script, tape or summary of the "attack" along with other information about the broadcast and offer such person or group "a reasonable opportunity to respond over the licensee's facilities"—subject to certain exemptions provided for in Section 73.123(b).

103 Section 73.123(c) would require that when "a licensee, in an editorial, endorses or opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to the other qualified candidate or candidates for the same office" a copy of the editorial along with other information about the editorial together with an offer of "a reasonable opportunity . . . to respond over the licensee's facilities." Thus, the Commission, is for the first time, proposing to impose by specific rules "precise" obligations on licensees in their application of some aspects of the fairness doctrine with all the attendant penalties which accompany violations of Commission rules.

CBS opposes the adoption of these rules. While we do not condone unfair personal attacks on the air, we believe these rules come dangerously close to, if they do not actually encroach on, the boundary lines of the First Amendment. They are not required by public interest considerations, and, in fact, will not serve the goals the Commission seeks to advance.

• • •

The personal attack doctrine was formulated as a special case under the broader and more fundamental fairness doctrine. The fairness doctrine was intended to serve the

public interest in the widest dissemination of information and conflicting views on current affairs and public issues rather than to provide an extrajudicial remedy for *private* parties. In implementing the doctrine, the Com-
104 mission stated in its 1949 report on "Editorializing By Broadcasting Licensees" and reemphasized in its July 6, 1964 Public Notice on the fairness doctrine that the licensee must have complete discretion to determine "what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented, and the spokesmen for each point of view." The Commision pointed out, in its 1949 report, that in some cases an individual's "personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist." Clearly this language anticipated an exercise of discretion on the part of the licensee. The Commission now proposes for the first time rules that would inflexibly require that, whenever such "personal attacks" occur, then without any exercise of discretion on the part of the licensee and without any consideration of the varying circumstances necessarily involved in such cases, the station must turn over its facilities to another regardless of his relationship to the main issue involved. As a consequence of the rules, the Commission would have the power to levy fines and possibly revoke licenses for non-compliance.

The proposed rules in this matter raise serious questions within the purview of the First Amendment and with respect to the proper scope of the Commission's powers in regulating program content and the day-to-day
105 operations of licensees. CBS believes that these rules would place constraints on freedom of speech

and freedom of the press. The First Amendment is media blind; it is as much violated by the Commission's directing a licensee to present an individual speaking on an issue the Commission finds "controversial" as it would be if the United States Post Office Department demanded the publication by *The New York Times* of the same statement at the risk of losing its special mailing privileges. CBS agrees that:

> ". . . the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgment of freedom of speech and press flatly forbids governmental interference, benign or otherwise."

This was the Commission's response (in its 1960 Report and Statement in the En Banc Program Inquiry) to suggestions that it require licensees to present specific types of programs on the theory that such action would enhance freedom of expression.

In the Notice the Commission recognizes "'that in some instances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred . . .'" (Par. 4.) We believe this uncertainty will be the usual rather than the exceptional case, especially for stations which broadcast a substantial amount of informational programming. Uncertainties such as this, together with the threat of burdensome administrative proceedings and pos-
106 sible forfeiture or revocation of licenses, will inhibit broadcasters from presenting vigorous opinions on current issues; rather, the bland and innocuous will in effect be encouraged. In proposing these rules the Commission seeks to assume the role of arbiter in determining whether certain speech in a particular broadcast is "controversial" and whether the language complained of in-

volves the "honesty, character, integrity or like personal qualities" of a person or group and where the licensee's decison is found wanting by the Commission—to punish the station through fines and possible license revocation. The Commission cannot arm itself with this power.

The proposed rules are therefore inherently incompatible with the constitutional requirement that channels of expression must be free of governmental coercion.

Further, the proposed rules intertwine the public interest in free debate with consideration for the private interests of individuals. This protection for private interests is not an objective of the fairness doctrine and is not an appropriate subject for rigid administrative regulation. In covering current issues of the day, basic journalistic techniques impel a broadcaster to obtain the views of a person subjected to attack. Inflexible governmental rules are unnecessary and undesirable in this area. Moreover, the fairness doctrine is concerned with the presentation of issues, not with the personal interests of any individual in his own prestige or reputation.

The proposed rules, to the extent they seek to protect private interests of persons who may be involved in
107 public controversy, would unnecessarily intrude the Commission into the day-to-day operations of licensees and jeopardize their legal rights. The definition of "personal attack" (an attack on an "individual's or group's integrity, character or honesty or like personal qualities") closely parallels the traditional standard of defamation. The private interests of persons who may be the subject of "personal attacks" are protected by the law of defamation. In some instances, of course, the public interest in free and unfettered discussion requires a limitation on such private remedies for there is indeed a:

> "profound national commitment to the principle that debate on public issues should be uninhibited, robust,

and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times* v. *Sullivan*, 376 U. S. 254, 270 (1964).

The broadcaster, no less than any other journalist or indeed any other individual, has certain defenses against charges of defamation, among which are truth and privilege of fair reporting of legislative, administrative and judicial proceedings. These defenses are rooted in the overriding public interest embodied in the First Amendment in uninhibited public debate and free flow of information to the public. The proposed rules, by requiring admissions on the part of the broadcaster, could well jeopardize these defenses. In addition, as a result of the rules proposed, the broadcaster might become subject to administrative penalties in a Commission proceeding where none of his legal defenses would be available.

108 Moreover, we submit that the proposed rules will not guide but will confuse. The Commission recognizes in its Notice the uncertainties involved in administering and interpreting the proposed rules. Thus the Commission states "in some instances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance. The proposed rules are not designed to answer such questions." It is difficult to reconcile this uncertainty with the Commission's announced objective of achieving a more precise delineation of licensee responsibility in this area. While the Commission states that the rules are directed to situations where "there could be no reasonable doubt under the facts that a personal attack had taken place", the Commission then cites, as examples of situations clearly within the proposed rule, statements calling a public official or other

person an embezzler or a Communist. We are not, however, convinced that even these situations are as clear as the Commission suggests. Assume that the persons involved are Communists. The Commission itself, in ruling number 6 in its July 6, 1964 Public Notice "Applicability Of The Fairness Doctrine In The Handling Of Controversial Issues Of Public Importance", stated that "it was not and is not the Commission's intention to require licensees to make time available to communists or the communist viewpoint." There is no indication that the Commission intends to change its position on this for the Notice states that the Commission proposes "to codify the procedures which licensees are required to follow in personal attack situations." Many other comparable situations spring to mind where the appearance of a
109 particular individual would not further the public dialogue. We believe that these decisions should best be left to the licensee directly involved who is, of course, possessed of more information on the personalities and issues involved.

Another indication of the confusion which the adoption of the proposed rules will cause is that while the rules appear to apply to all types of broadcasts, we must assume that they are inapplicable to those classes of broadcasts which the Commission has previously excluded from the scope of the personal attack rule. Thus in the *Times-Mirror* ruling, 24 R.R. 404 (1962), which the Commission cited in the Notice, the Commission wrote:

> "The Commission's ruling, however, must be construed in the context of the facts giving rise thereto. Thus, newscasts, news interviews, etc., or, indeed, the above-mentioned discussion programs would not, as a general matter and absent conditions such as those discussed in the Commission's telegram, appear to be encompassed by the Commission's ruling. As

to the above-mentioned discussion program, it appers that both parties were equally represented, and, therefore, it seems clear that opportunity was afforded for opposing viewpoints on all of the issues discussed."

Moreover, in connection with the broadcasting of the CBS REPORTS documentary "Biography of a Bookie Joint", although allegations were made to the Commission that the broadcast represented an attack on the Massachusetts Legislature through the remarks made in the documentary by a member of that legislative body, CBS did not offer time to the Legislature and was not required to do so by the Commission.

We believe that the rule proposed by the Commission relating to station editorials in favor of or in opposition to political candidates is unwise and is open to many of the objections we have previously noted with respect to the personal attack rules. Here again the Commission has failed to indicate the reasons which require adoption of a rule in this area. Its latest (1964) SURVEY OF POLITICAL BROADCASTS, likewise gave no indication of any abuses by licensees in this area. In effect, the Commission proposes through this rule to broaden the "equal opportunities" provision of the Communications Act. Similarly, the proposed rule is made mechanically applicable to all such station candidate editorials, regardless of the time a station otherwise makes available to candidates in its total schedule. It is indeed possible that a licensee's attempt to comply with the proposed rule might lead in some instances to a serious imbalance of time on its facilities, in favor of the candidate who is the recipient of the station offer of time required by the proposed rule.

While the procedure prescribed by proposed Section 73.123(c) may seem desirable to some licensees, there does

not appear to be any compelling reason for it to be embodied in an inflexible rule and forced upon all licensees. Since a licensee is, in any case, required to maintain fairness and balance in its overall coverage of a
111 campaign, its editorial statement which is merely a part of that coverage, should be judged within that framework. In this connection, it may be noted that the rule purports to prescribe conduct in the event a licensee "endorses" a candidate in an "editorial" without defining what constitutes either an "editorial" or an "endorsement."

The proposed rule will deter some broadcasters from engaging in political activity in the same way that the Commission's interpretation of the "equal opportunities" requirements of Section 315 has curtailed the time which some licensees would otherwise make available to political candidates. We cannot believe that this is the intention of the Commission. The proposed rule seems to be at cross purposes with the exercise of First Amendment freedoms by broadcasters and with the public interest in having broadcasters contribute through their broadcasting to the ascertainment and discussion of community problems.

* * *

In conclusion we believe that proposed Sections 73.123(a), (b) and (c) are inconsistent with the basic principles of the First Amendment and are not in accord with the public interest. We believe that adoption of these rules will result in a continuing and growing involvement of the Commssion in the news judgments of licensees. For the first time since the Commission promulgated its fairness doctrine, it now seeks to judge licensee compliance
112 with the fairness doctrine on the basis of individual incidents. The proposed rules would substitute inflexible Commission-dictated procedures for the good-faith exercise of discretion by licensees. For these reasons,

CBS opposes the adoption of proposed Sections 73.123(a), (b) and (c).

Respectfully submitted,

COLUMBIA BROADCASTING SYSTEM, INC.

By /s/ LEON R. BROOKS
/s/ ALBERT HAYDEN DWYER
/s/ JOSEPH DEFRANCO
/s/ PAUL N. STERNBACH
/s/ RALPH E. GOLDBERG
/s/ ELEANOR S. APPLEWHAITE

Its Attorneys

51 West 52 Street
New York, New York 10019

June 20, 1966

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113 **Comments of Carroll M. Barringer**

Carroll M. Barringer, licensee of Radio Station WLCO, Eustis, Florida (WLCO), by its attorneys, submits these Comments in opposition to the Commission's proposal to amend its Rules relating to Editorializing. In support hereof, the following is shown:

1. It is believed that the proposed Rules are essentially based upon the concept that broadcast licensees are lacking in "responsibility" and, therefore, specific Rules are required in order to "enforce" responsibility. It is submitted that the facts dictate the contrary. The vast majority of licensees have demonstrated a substantial sense of responsibility and awareness of the obligations of broadcasters. Stations which are operated by such
114 responsible licensees, in treating upon controversial issues, are entirely competent to effectively produce

a contradictory point of view and to substantiate this viewpoint without the inference of personal character defamation. Moreover, the "attack" concept is impossible of precise definition. Certainly in cases where an "attack" is made, the subject of the attack already has ample remedies available. For example, a specific ruling may be requested of the Commission and a determination made whether the licensee involved has sufficiently discharged his obligation to insure fair presentation of all viewpoints and, if not, that licensee may then be required to discharge that obligation. Should there, in fact, be actual character defamation, there already exist ample civil remedies in way of damages—actual *and* punitive—which may be imposed by a judicial body entertaining a greater expertise in what is then essentially a "civil" matter.

2. It is the opinion of WLCO that the Commission would better fulfill its role by imposing more intensive standards regarding the qualification of applicants before facilities are granted to such applicants, rather than attempting to, in effect, regulate program content after having granted a license. Once the Commission has granted
115 a license, in the opinion of WLCO, full and complete responsibility for program content should thereafter be vested in the licensee of the facility involved. As already noted, any flagrant violation—such as defamatory conduct—or any infringement upon the legal and constitutional rights of any individual, group or organization, may then be reconciled and resolved in a court of law.

3. It is also believed that administration of the proposed Rule would be a practical impossibility. It cannot be conceived that the Commission is in a position to effectively comprehend all of the background involved in a particular Editorializing situation. For example, a licensee—*in the discharge of licensee responsibility*—may necessarily be required to "attack" a corrupt official. Such action, while

a responsible one, may not be consistent with "political" wisdom. The official, for example, may be in an influential position and thus able to bring pressure to bear upon the Commission in a manner that precludes the licensee from adequately presenting the basis of his attack. In the alternative, the licensee may be compelled to refrain from Editorializing until it is too late to accomplish what the community interest requires. At the very least, promulgation of fixed Rules and Standards can only serve to dissuade licensees, at the risk of penalty, from effectively serving the public interest and discharging the responsibilities as a broadcast licensee.

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In summary, if licensees are deemed to have Editorial responsibilities, then licensees must be given broad leeway in the discharge of such a responsibility. The promulgation of fixed Standards and Rules, with attendant punitive devices, is a contradiction of the freedom necessary to the effective implementation of the responsibilities of a licensee.

Respectfully submitted,

CARROLL M. BARRINGER

By /s/ KEITH E. PUTBRESE
Keith E. Putbrese

By /s/ JASON L. SHRINSKY
Jason L. Shrinsky

By /s/ B. JAY BARAFF
B. Jay Baraff

Dated: June 20, 1966

Of Counsel:
GROVE, JASKIEWICZ, GILLIAM
& PUTBRESE
600 Madison Building
Washington, D. C. 20005

118 **Comments of Cape Fear Telecasting, Inc.**

Cape Fear Telecasting, Inc., licensee of Television Station WWAY (TV), Wilmington, North Carolina (WWAY), by its attorneys, submits these Comments in opposition to the Commission's above-referenced proposal to amend Part 73 of its Rules relating to Editorializing. In support hereof, the following is shown:

1. The Commission has generally recognized and acknowledged the desirability of retaining a degree of flexibility with regard to matters generally coming under the purview of the fairness doctrine. WWAY believes this a necessity in view of the practical impossibility of making *a priori* determinations as to "what" constitutes fairness; unfairness; controversy; or an "attack". As in so many matters which involve questions of freedom of speech,
119 these are not concepts which readily lend themselves to narrow categorization or codification in a set of Rules.

2. In its *Public Notice* released July 6, 1964, dealing with the Fairness Doctrine,[1] the Commission stated that:

> "In passing on any complaint in this area, the Commission's role is not to substitute its judgment for that of the licensee . . . but rather to determine whether the licensee can be said to have acted reasonably and in good faith. There is thus room for considerably more discretion on the part of the licensee under the fairness doctrine than under the 'Equal Opportunities' requirement".

The Commission also went on to state:

> "In an area such as the fairness doctrine, the Commission's rulings are necessarily based upon the facts of the particular case presented, and thus a variation

[1] 2 RR, 2d 1901, 1904 (1964).

in facts might call for a different or revised ruling. We therefore urge that interested persons, in studying the rulings for guidance, look not only to the language of the ruling but the specific factual context in which it was made."[2]

In its Report on Editorializing By Broadcast Licensees,[3] at Paragraph 10, the Commission also stated:

120 "It should be recognized that there can be no one all-embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered . . .".

3. It is believed that the Commission has, therefore, itself acknowledged the subject matter of its proposal to be so ephemeral as to be an improper subject for the establishment of rigid and fixed standards. Thus, it would likewise be both impractical and inordinately burdensome to impose upon licensees, where the applicability of such standards is so contingent upon uncertainty, the threat of violation. If there is to be a fairness doctrine, then its administration can best be handled on an *ad hoc* basis. There already exists, of course, a body of case law and Commission rulings. If the Commission would then promptly extend further interpretive rulings upon the request of licensees, this would afford a much more feasible alternative. The role of the Commission in this area should be administratively helpful rather than judicially punitive.

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[2] *Ibid.*

[3] 13 FCC 1246 (1949).

121 4. Moreover, to promulgate fixed rules in this area, with their attendant penalties for failure to comply, would be to encourage pusillanimity on the part of broadcast licensees. The natural tendency on the part of most broadcasters would be to "play it safe" and not endanger their licenses or finances by broadcasting matters of a controversial nature. It would create a deleterious effect with respect to those few crusading radio and television journalists, who, in the exposure of graft or corruption in a community, would run the risk of violating the personal attack doctrine even though exposing the "corrupt" official. In short, the proposed Rules, while designed to "enforce" responsibility, would have the actual effect of "discouraging" licensee responsibility. This is hardly consistent with the public interest standard.

Respectfully submitted,

CAPE FEAR TELECASTING, INC.

By /s/ KEITH E. PUTBRESE
Keith E. Putbrese

By /s/ JASON L. SHRINSKY
Jason L. Shrinsky

By /s/ B. JAY BARAFF
B. Jay Baraff

Dated: June 20, 1966

Of Counsel:
GROVE, JASKIEWICZ, GILLIAM
& PUTBRESE

123 Comments of

Bedford Broadcasting Corporation (WBIW), Bedford, Indiana

Central Broadcasting Corporation (WKBV-AM-FM), Richmond, Indiana

Continental Broadcasting Corporation (WHOA), Hato Rey, Puerto Rico

The Evening News Association (WWJ-AM-FM-TV), Detroit, Michigan

Marion Radio Corporation (WBAT), Marion, Indiana

Moline Television Corporation (WQAD-TV), Moline, Illinois

Radio Television News Directors Association

Reams Broadcasting Corporation (WCWA-AM-FM), Toledo, Ohio

RKO General, Inc. (WOR-AM-FM-TV), New York, New York; (WHBQ-AM-TV), Memphis, Tennessee; (KHJ-AM-FM-TV), Los Angeles, California; (WNAC-AM-TV, WRKO-FM), Boston, Massachusetts; (WGMS-AM), Bethesda, Maryland; (WGMS-FM), Washington, D.C.; (KFRC-AM-FM), San Francisco, California

Royal Street Corporation (WDSU-AM-FM-TV), New Orleans, Louisiana

Roywood Corporation (WALA-TV), Mobile, Alabama

Time-Life Broadcast, Inc. (KLZ-AM-FM-TV), Denver, Colorado; (WFBM-AM-FM-TV), Indianapolis, Indiana; (WOOD-AM-FM-TV), Grand Rapids, Michigan; (KOGO-AM-FM-TV), San Diego, California; (KERO-TV), Bakersfield, California

WKY Television System, Inc. (WKY-AM-TV), Oklahoma City, Oklahoma; (WTVT), Tampa, Florida; (KTVT), Fort Worth, Texas; (KHTV), Houston, Texas; (WVTV), Milwaukee, Wisconsin

• • •

The Commission in the instant proceeding proposes to adopt as a formal regulation two phases of its "fairness doctrine." Proposed Section 73.123(a), which relates to personal attacks on an "identified person or group" in the course of "the presentation of views on a controversial issue of public importance," contains specific directions requiring the licensee to notify the "person or group attacked" and to offer "a reasonable opportunity to respond over the licensee's facilities." Similarly, proposed Section 73.123(c), which deals with editorials by a licensee endorsing or opposing a political candidate, provides for the notification (including transmittal of the tape or script) of the opposing candidate or candidates within 24 hours and requires the licensee to offer "a reasonable opportunity for a candidate or a spokesman for the candidate to respond over the licensee's facilities." The notice accompanying the proposed rules makes clear that they are based upon the Commission's overall "fairness doctrine" as to
131 "controversial issues of public importance" and further cites as statutory authority for adoption of the rules Sections 4(i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

While perhaps more direct than heretofore, the two instant proposals constitute further evidence of a Commission purpose to interfere with the exercise of the journalistic and editorial function of the electronic press. The "fairness doctrine," which the proposed rules are intended to supplement, has long been an instrument of Commission regulation which has impinged upon the free exercise of the journalistic function by broadcasters. Likewise, the remaining requirements of Section 315 have long compelled the broadcast industry to operate in a manner abhorrent to the freedoms protected by the First Amendment to the Constitution. Since the Commission has bottomed its asser-

tion of authority and power to adopt the proposed rules upon Section 315 and the "fairness doctrine," it is our purpose herein to challenge the constitutionality of the reliance the Commission has placed thereon as a basis for justifying its dubious intrusions into the constitutionally-protected area of freedom of speech and freedom of the press. Whatever other weaknesses the proposed rules may have, their ultimate validity must rest upon the constitutional validity of the statutory and regulatory concepts upon which the Commission asserts they rest.

We are not so naive or lacking in sophistication as to believe that, however compelling our argument, the Commission will decide that Congress acted unconstitutionally in adopting Section 315 and its amendments or that the Court of Appeals has been wrong from *Trinity*[1] to now in endorsing program regulation by the Commission. Our only relief, as a practical matter, in view of the concurrence of the Commission and the Court of Appeals, is in
132 fully and fairly presenting the issue to the Supreme Court. Our presentation, therefore, is not a futile exercise in dialectics but a serious attempt to lay the foundation for determination by that supreme tribunal. We expect only that the Commission will sharpen the issue by candidly and thoroughly treating with the questions we present. We are aware that the Court of Appeals recently, by way of dicta, impliedly endorsed the "fairness doctrine" as "a sine qua non of every licensee."[2] It is our fervent goal to re-establish the freedom of the electronic press protected by the First Amendment as the "sine qua non" of broadcast regulation.

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[1] *Trinity Methodist Church, South* v. *FRC*, 61 App. D.C. 311, 62 F. 2d 850 (1932), *cert. denied*, 288 U.S. 599 (1933).

[2] *Office of Communication of the United Church of Christ* v. *FCC*, 7 R.R. 2d 2001, 2017 (D.C. Cir. 1966).

I.

Preliminary Considerations

A. Broadcasting Is Entitled to the Same Constitutional Protection Afforded Other Communications Instruments Making Up the Constitutionally-Protected Press.

The fairness doctrine policies and the equal opportunity provisions of Section 315 were developed and adopted by Congress and the Commission at a time when conventional wisdom doubted that radio and television were entitled to the protection of the First Amendment of the Constitution guaranteeing freedom of speech and of the press. The equal opportunity requirements of Section 315 have been part of the law, in one form or another, since the Radio Act of 1927. The fairness doctrine had a somewhat ambiguous *ad hoc* origin during the early 30's and was first set forth as a definitive policy by the Commission in dicta in the *Mayflower* decision in 1940.[3]

The doubts of the 20's and 30's about the inclusion
133 of electronic media in the term "press" were eliminated in the 40's and 50's. The premise that radio and television are excluded can no longer serve as justification for the type of government abridgement reflected by the fairness doctrine and the equal opportunity provisions of Section 315. Thus, the Supreme Court has made clear that radio and television, as well as other instruments of communication that inventive genius may bring into being, are entitled to the protection of the First Amendment to the Constitution guaranteeing freedom of speech and of the press.[4] In short, the "press" in its historic con-

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[3] *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940).

[4] *Estes* v. *Texas*, 381 U.S. 532, 540, 585, 589, 604, 615 (1965); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938). See *American Broadcasting Co.* v. *United States*, 110 F. Supp. 374, 389 (S.D.N.Y. 1953), *aff'd*, 347 U.S. 284 (1954). Compare FCC Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry, 20 R.R. 1901 (1960).

notation comprehends every sort of communication instrument which affords a vehicle of information and opinion.[5] Thus, broadcasting as part of the press in the constitutional context is entitled, without qualification or exception, to the same protection afforded to all other communication instruments making up the "press" protected by the Constitution. Any impingement upon broadcasting's constitutional rights and privileges can be no greater than the permissible constitutional impingements which may be applicable to all other communication instruments embraced by the Constitntion. The shibboleth that "radio and television are different" no longer can serve as a password for government intrusion.

We need not further belabor this point, since the Commission, in its program policy statement,[6] even
134 though ignoring or unaware it was acting to the contrary, nevertheless, recognized the applicability of the First Amendment to broadcasting, when it stated:

> "[W]e are constrained to point out that the First Amendment forbids governmental interference asserted in aid of free speech, as well as governmental action repressive of it. The protection against abridgement of freedom of speech and press flatly forbids governmental interference, benign or otherwise." 20 R.R. at 1907.

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[5] *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938). The fact that broadcasting devotes itself to disseminating entertainment as well as information and opinion is not grounds for withholding First Amendment protection from it—"What is one man's amusement, teaches another's doctrine." *Winters* v. *New York*, 333 U.S. 507, 510 (1948).

[6] FCC Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry, 20 R.R. 1901, 1905-07 (1960).

B. The Fairness Doctrine and the "Equal Opportunity" Provision of Section 315 Have Resulted in Less, Not More, Broadcasting of Information in the Public Interest.

Being both communicators and citizens in a free and open society, we can easily and most heartedly endorse the need of a democratic society for an informed electorate. The issue here is not that goal, but the means of getting there. Experience has demonstrated that the means which the Commission and Congress have selected to reach this goal —the fairness doctrine and the political candidate equality requirements of Section 315—reflect presumptions that offend reality. The application of these manufactured restraints upon broadcasting has neither increased the broadcast of diversity of opinion nor expanded free speech, but, rather, has compelled suppression and blackout. These restraints promote pusillanimity and weakness of voice among a host of competent contributors—the electronic press.

For example, it is widely recognized that the four classic Kennedy-Nixon debates during the 1960 campaign for President could not have been held in the absence of congressional suspension of the equal opportunity requirements for presidential candidates. In the absence of such suspension, in order to hold these four one-hour debates, the networks and stations could have been subjected to governmentally-supported demands for equal time, aggregating as much as 56 hours of additional free time under the equal opportunity provisions, from fourteen other presidential candidates. Presently, the "trade-off" with government to carry four hours is the elimination of 52 hours of other communications in order to make way for the government-dictated program.

Prior to and since the temporary suspension of the Section 315 requirement for presidential candidates in 1960,

networks and broadcasters simply have not offered free time to major presidential candidates for discussion and debate because of the knowledge that, if they did so, they would be inundated with requests by insignificant splinter parties and groups. Thus, the law completely discourages broadcasters from asking major candidates to engage in free debate and discussion, since it requires them to grant equal time to candidates whose interest to the public is not more than the smatter of votes that they receive at the polls.[7]

Section 315 restrictions also serve to deprive broadcasters of the ability to expose candidates to the public on the local and state level by offering free time for debate and discussion. All of the parties to these comments have experienced situations, such as where there were sixteen candidates for governor, eleven candidates for mayor, ten candidates in a congressional primary, etc., which by sheer arithmetical weight made it impossible for them to offer free time for meaningful debate and discussion. If we multiply the volume which might be involved in an election for a single office by the number of offices which might be involved in a single election ranging from state to federal, broadcasters have no freedom whatsoever to treat major parties, offices and candidates with the extensive attention the electronic press believes they deserve. The same restriction applies even where time is sold rather than donated by the
136 broadcast licensee. Here again the sheer number of competing candidates often requires the station to refuse to carry any message by political candidates for a particular office even though the political candidates are willing to pay for the time, since meaningful equal time could not be made available to ten or twenty other candidates for the same office. The net result is that the public

[7] For example, in 1956 the presidential candidate of the American Party received 483 votes and the presidential candidate of the Christian Nationalist Party is reported to have received only eight votes.

often receives no information whatsoever from the broadcast media concerning the candidates for particular public offices, as contrasted to the substantial political discussion which could be made available by the broadcaster if he were permitted to exercise the free journalistic judgment accorded by the Constitution to the "press."

The Commission's vacillating approach toward a broadcaster's right to editorialize and his situation as a Commission licensee have served to restrict, inhibit and frustrate the exercise of freedom of speech in this area. Prior to the Commission's decision in the *Mayflower* case[8] broadcasters had been free to editorialize. In the *Mayflower* decision the Commission flatly forbade broadcast editorialization, and this prohibition remained in effect until 1949, when the Commission, quite begrudgingly, decided to permit editorialization so long as it comported with the fairness doctrine.[9] Since then the Commission has sought to encourage editorialization by licensees, and, in its 1960 Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry,[10] it elevated editorialization by licensees to one of "the major elements [of broadcast performance] usually necessary to meet the public interest, needs and desires . . . ."[11] If there are no constitutional limitations upon its discretion, there is nothing to prevent the
137 Commission from returning to the flat prohibition on editorialization which it previously applied.

The confusion arising from the Commission's action in forbidding or greatly qualifying a broadcaster's right to editorialize has undoubtedly had an effect upon the exercise

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[8] *Mayflower Broadcasting Corp.*, 8 F.C.C. 333 (1940).

[9] FCC Report, Editorializing By Broadcast Licensees (hereinafter "FCC Editorializing Report"), 25 R.R. 1901 (1949).

[10] 20 R.R. 1901 (1960).

[11] *Id.* at 1913.

of this right by broadcasters. While we do not pretend to know all the causes, approximately 40% of AM stations, about 55% of TV stations and 70% of FM stations in 1965 did not editorialize. Many have exercised "self-censorship" by remaining silent in the area of editorial opinion because they are not certain of the burdens and hazards. Nor have the fairness doctrine concepts which the Commission has applied to the right to editorialize been conducive to free editorialization by broadcast licensees. In substance, the Commission has conditioned each individual broadcaster's right to editorially speak what is on his mind and conscience with a requirement that the broadcaster also give equal exposure to contrary ideas which may be abhorrent to the mind and conscience of the broadcaster. Thus, the Commission has invaded the sphere of intellect and spirit by compelling broadcasters to publish what is not in their minds[12] and to broadcast matters which their "reason" tells them should not be published.[13] On occasion some broadcasters find that broadcasting views contrary to their own mind and conscience is too high a price to pay for the right to editorialize, and, therefore, they "self-censor" expressing editorial opinion upon issues on which they may have personal views. The "self-censorship" is not accidental but an apparent purpose of the fairness doctrine.

A similar inhibition follows from the Commission's requirement that any editorial endorsement or opposition to a political candidate must be accompanied with an
138 offer of free time to spokesmen for candidates for the same office to reply to the editorial endorsement or opposition. Any station desiring to oppose a political candidate because he is a Communist, a member of the

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[12] *Cf. West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

[13] See *Associated Press* v. *United States*, 326 U.S. 1, 20 n. 18 (1945).

American Nazi Party, a member of the Ku Klux Klan or other radical extreme racist or economic group will naturally think twice before attacking such a candidate if, as a condition, he must give spokesmen for such groups the right to express views which are contrary to the mind and conscience of the broadcaster. A broadcaster will often determine that it would be an imposition on the public to force upon it a vicious racial and religious diatribe by a candidate such as George Rockwell of the American Nazi Party as part of the price of a voluntary editorial opposition to his political candidacy. Further, by the calculus of chance, the reply of the spokesman might benefit the candidate the broadcaster opposes in some cases more than the broadcaster's editorial endorsement may benefit the candidate he supports. The chances are that this requirement will serve effectively as an absolute prohibition against editorial political endorsement in many cases.

Another inhibiting effect of the fairness doctrine flows from situations where there are so many divergent views on a particular issue that the burden of handling them all makes it impossible for the broadcaster to deal with any particular side because of the fairness doctrine requirements. Thus, parties to these comments have experienced situations where there have been as many as eight or ten sharply divergent viewpoints existing on public issues such as the need for more public college facilities, water problems in the Western states, fluoridation of water, etc. The burden and impossibility of discovering and properly analyzing all of these different views for presentation has sometimes caused the subject to be ignored in its entirety. For example, if a station desired, after considerable research, to support the need for additional public college facilities, it would have to expose as many as seven or eight contrary viewpoints expressed by such parties
139 as low tax groups; spokesmen for private universities; spokesmen for the large university versus the

small college, and vice versa; legislative and educational groups having different educational philosophies; proponents of trade schools versus junior colleges; etc. In balancing the amount of time it would be required to give meaningful exposure to such a volume of divergent viewpoints as against public need for other kinds of programming, the broadcaster may often determine that his editorial viewpoint on public education would result in an imposition upon, rather than a benefit to, the public.

Another restriction of speech flowing from the Commission's fairness doctrine results from the requirement that a broadcast station broadcasting one side of a controversial issue must broadcast other substantial sides of the same issue, since this requirement compels the broadcaster to substitute other sides of the controversial issue for programs which he might determine were more needed by the public.[14] In short, the Commission, in its fairness doctrine, has reached an *a priori* conclusion that the broadcast of all, rather than one side of a particular controversial issue, is more socially desirable and more in the public interest than any other conceivable program that the broadcaster might otherwise broadcast. Thus, in many instances, in order to meet the compulsory mandate of the fairness doctrine, the broadcaster is forced to delete programs desired by the public merely to show the other side or to give an opposing candidate equal time. Because of the time limitations under which a station operates, this results in the program which might otherwise have been broadcast being deleted from the station's program schedule, quite as effectively as if the Commission had ordered such other program not to be broadcast. For a governmental mandate that establishes priority of communications in media limited by hours of the

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[14] A similar result flows from the equal opportunity provisions of Section 315 with reference to equal time for political candidates.

day not only orders the communication of preferred
140 messages but effectively prohibits communication of messages having a lower order of governmental preference.

The so-called "personal attack" requirement which compels a station to send a tape or script and offer time to a person so attacked also serves as an inhibiting factor in determining the amount of free-wheeling opinion and robust debate a broadcaster may be willing to carry.

Broadcasting has reached the point of development where many sponsors are willing to underwrite the broadcast of public affairs programming, thus extending their horizons beyond the historical entertainment and news sponsorship. The Commission has construed the fairness doctrine to require a broadcaster carrying, for the first time, one side of a controversial issue on a sponsored program to carry other sides sustaining if a sponsor cannot be found for such other sides. In short, if the broadcaster carries one side of a controversial issue presented by a sponsor, he may find himself compelled to contribute a like or even greater amount of time to those with opposing viewpoints if they are either unable or unwilling to pay for time to express their opposition. Since *time* is the principal commodity a broadcaster has to sell, this compulsion results in a confiscation of the broadcaster's time by the Commission without compensation. The inhibiting effect that this has upon the broadcaster is readily apparent—few broadcasters desire to sell one hour of time if they are required to throw in a bonus of an additional hour merely to meet the Commission's fairness doctrine. This burden may, in many cases, induce the broadcaster to avoid the meshes of the fairness doctrine by exercising government-coerced "self-censorship" to the extent of avoiding the broadcast, for the first time, of one side of a particular controversial issue even though a sponsor may be willing to pay for such broadcast.

The Commission seems to recognize that the restrictions here discussed necessarily tend to deter broadcast programming in the matters of public affairs, for the Commis-
141 sion has found it necessary in a wide variety of ways to impose upon the broadcaster an obligation to devote time to public affairs as an essential element of his obligation to operate in the public interest.[15] Thus, restrictions beget more restrictions, and there is no end in sight.

To recapitulate, based upon experience,[16] it is the consensus of the parties to these comments that:

(1) The equal opportunity provisions of Section 315 have served to inhibit and restrict broadcasters from offering to the public debates and discussions by major political candidates.

(2) The fairness doctrine requirements that all significant sides of controversial issues must be presented by each individual station have served to inhibit and restrict the broadcast of controversial issues in varying degrees.

(3) The doubts created by the Commission's past actions in the editorialization area, as well as the application of the fairness doctrine concepts to broadcast editorials, have served to restrict and inhibit not only the number of stations which in fact editorialize, but also have served to restrict the number of editorials broadcast by individual stations.

(4) The "personal attack" requirements of the fairness doctrine have served to restrict the uninhibited, ro-

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[15] See FCC Public Notice, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance (hereinafter "FCC 'Fairness Primer' "), 29 Fed. Reg. 10416, 2 R.R. 2d 1901 (1964).

[16] See Appendix A for a more complete factual discussion of the restrictive and inhibiting effects of the fairness doctrine and the equal opportunity requirements of Section 315.

bust and wide-open debate of controversial issues, since the burdens flowing therefrom—plus the Commission's implicit disapproval of the broadcast of such personal attacks—tend to coerce stations to blunt the edges of sharp debate.

142 (5) The asserted right of Congress and the Commission to interfere in such constitutionally-protected areas as the broadcast publication of controversial issues, editorials and political discussions, has created arbitrary hazards in the form of possible Commission sanctions, resulting in the adoption by broadcasters of a form of government-coerced "self-censorship" which has led to the broadcasting of less, rather than more, information of this type to the public.

(6) Both the equal opportunity provisions of Section 315 and the fairness doctrine have the effect of ordering broadcasters to carry programs preferred by government in place of those preferred by the broadcasters or the public.

II.

The Operational and Legal Environment in Which Broadcasting Functions

We ask indulgence at this juncture for acceptance, *arguendo*, of the views we hold most firm (and which we will further support with documentation and argument) that:

A. There is no established constitutional principle that discretionary legislative or administrative restraints on communications are justified:

1. If the facilities of the medium are scarce, relatively or absolutely; or

2. If the medium is highly effective and widely attended; or

3. If a license from government is required before operations are commenced; or

4. If a license is a privilege rather than a right; or

143 5. If the medium uses the public domain; or

6. If the restraint is after the communication, in the form of a penalty, and not before, in the form of a command; or

7. If the medium is privately-owned and operates for a profit; or

8. If it advocates one point of view and excludes all others.

B. The press (all mass media) is not a stagecoach obligated to carry all ideas ready to travel.

We ask this indulgence because the threshold constitutional principle involved here is most often ambushed by interminable arguments on the foregoing "ifs," all of which are completely sterile as devices to dilute the liberty of the press (all mass media). We wish first to consider whether this threshold constitutional principle can be invoked here to support the constitutionality of the fairness doctrine or Section 315. That principle is: *Such restraints are constitutionally acceptable only if a serious and substantial threat to our social order is imminently present to a high degree—that is, we are faced with a clear and present danger.*

From a review of all the Commission literature which presents (we confess, quite confusingly) the rationale for the fairness doctrine and Section 315, we can extrapolate only one postulate that, if supportable as true, might meet this threshold constitutional standard. The postulate is: The success and viability of our democratic institutions are seriously and immediately threatened because the electorate

is exposed in high degree to one-sided communications on political and social issues, and its judgments, therefore, will fall short of the intelligence that is demanded if our democratic institutions are to survive. To justify the fairness doctrine and Section 315, this postulate *must* be true.

In testing this postulate, it is necessary first to determine the quality and quantity of communications that
144 normally and regularly reach the typical voter. This involves an understanding of the universe of communications that influence the opinions that he forms.

The weight of these influencing communications and their source have been widely studied by our modern social scientists. They tend generally to classify sources as primary, reference and media sources. The primary sources include family, church, school and economic and social environment of the individual. The communications within these primary groups are credited with a high degree of influence. Thus, it is well established that a person's religious faith and political beliefs may be influenced far more by his family background than by any fine-spun media discussion of theological or political principles.

The reference sources include such organizations as labor unions, service clubs, professional and business associations, veterans organizations, political parties and other similar groups. Social scientists have established that the communications within these organizations have a substantial influence in the formation of the opinions of its members. For example, membership in a labor union and its communications will have a significant effect upon a person's opinion of a guaranteed annual wage, and membership in the American Medical Association and its communications will have a substantial influence upon a doctor's views on Medicare.

With the mass and variety of communications that pass within the primary and reference groups, it certainly cannot be assumed that a condition of one-sidedness on the part of the typical voter is threatened, even assuming one-sided mass media. And, when the massive and diversified communications that do in fact reach the typical voter through mass media are considered, it is completely unreasonable to assume that a significant number of adults in the United States are in the circumstance of making political judgments and decisions after having heard only one side of the issue.

145 There are 1,763 daily newspapers in the United States with a total daily circulation of over 60 million.[17] There are approximately 478 weekly periodicals with a total circulation of approximately 105 million.[18] There are also 1,445 monthly periodicals with a total circulation of 185 million.[19] There are 666 general monthly and weekly consumer magazines having a total annual circulation of 4,781,310,000.[20] In 1964 there were 20,540 new books published in the United States covering all categories of human endeavor and covering a wide range of contemporary religious, sociological, economic and political issues.[21] In addition, 7,909 new editions of older works were published during that year.[22] Also, over 36 million college textbooks were sold during the year 1963.[23] There are 13,750 four-wall and drive-in motion picture theaters in

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17 Editor and Publisher International Yearbook, 1965.

18 1965 Statistical Abstract of U.S. 524, No. 730 (1958 figures).

19 *Ibid.*

20 Magazine Advertising Bureau, *The Growth of the Magazine Publishing Industry*, Circulation No. 3 (1964).

21 1965 Statistical Abstract of U.S. 527, No. 734.

22 *Ibid.*

23 *Id.* at 526, No. 733.

the United States which have an average weekly attendance of in excess of 43 million.[24] There were 502 new motion pictures released in the United States during the year 1964.[25] Finally, the public is exposed to a wide variety of information in numerous lecture halls, public parks and streets, and through adult education activities. All of this in addition to 6,347 broadcasting stations.

With the exception of broadcasting, none of the sources of influential communications alluded to above is subject to the equal opportunity or fairness restrictions im-
146 posed upon the broadcaster. Indeed, advocacy—not objectivity—is their typical style. Their combined influence on opinion formation is patently so overpowering that to leave them free of government-imposed standards of equal access to candidates and points of view and yet impose the same on broadcasters is an exercise in gnat-swatting.

From this consideration of the market place of political and social ideas, it is not only clear that no one-sided condition on the part of the electorate can exist but, rather, the certainty is that there is a virtual deluge of diversified, conflicting and antagonistic opinions that flood the electorate. Therefore, there is no serious social evil that imminently threatens our democratic institutions. And this is constitutionally decisive, in our view, because it completely destroys the extrapolated postulate for the restrictions the government seeks to impose upon the broadcaster.

We think there must be agreement that the postulate on the threshold constitutional test discussed above has no support in what really exists.

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[24] Film Yearbook, 1965.

[25] *Ibid.*

Even if we isolated broadcasting from the combined opinion-influencing communication media discussed above, which the Commission does erroneously,[26] there is a total absence of any substantial, serious and imminent threat of unfairness on the part of broadcasters. Even though broadcasters may protest the application of the fairness doctrine by the Commission as a complex and ambiguous *legal* obligation, the concept of fairness was adopted by the broadcast industry out of business prudence as a sound journalistic ethic long before it was made obligatory as a matter of definitive Commission policy. As
147 early as 1929, in an early *ad hoc* application of a fairness concept, the Commission found that "the great majority of broadcasting stations are, the Commission is glad to say, already tacitly recognizing a broader duty than the law imposes upon them"[27] in the broadcast of discussions of issues of importance to the public. In 1939 the National Association of Broadcasters Code included the following industry expression of the doctrine of fairness:

> "As part of their public service, networks and stations shall provide time for the presentation of public questions including those of controversial nature. Such time shall be allotted with due regard to all the other elements of balanced program schedules and to the degree of public interest in the questions to be presented. Broadcasters shall use their best efforts to allot such time with fairness to all elements in a given controversy."

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[26] The Commission has held that the requirements of fairness apply to a broadcast licensee irrespective of the position which may be taken by other media on the issue involved, and a licensee's own performance in this respect, in and of itself, must demonstrate compliance with the fairness doctrine. FCC "Fairness Primer," *supra* note 15, 29 Fed. Reg. at 10418-19, 2 R.R. 2d at 1910-11.

[27] *Great Lakes Broadcasting Co.*, 3 FRC Ann. Rep. 32 (1929).

In 1940, when the Commission first set forth the fairness doctrine as a definitive obligation and policy, it merely turned a widespread industry practice into a legal obligation without any explanation as to how such government intrusion could be warranted under the clear and present danger test postulated above.

The Commission has ignored the salient fact that Congress, in leaving the development and operation of broadcasting to private enterprise, had *ipso facto* built in forces serving the cause of fairness far more effective than any conceivable government intrusion—among others, that right conclusions are more likely to be gathered out of a multitude of competing stations than through any kind of authoritative selection. It is the experience of the parties to these comments that any station desiring to achieve widespread community and listener acceptance must gain a reputation for responsibility and maintain a relatively high
148 "credibility quotient." Since listener acceptability may be equated with station profitability, any profit-motivated station under our privately-owned broadcast system will naturally tend to avoid offense to any group, to moderate advocacy and to attempt to gain a reputation for apparent integrity and fairness. Another force working for the cause of fairness and moderation is the competition which exists not only between broadcast stations but also between other competing media. Such competing media are also standing by ready to combat any error of unfairness committed by any broadcaster and, to the extent that they are able to do so, they diminish the community acceptance and hence the profits of the station committing such an error. Another force compelling the broadcast of varying sides of controversial issues is that "controversy" simply happens to be good programming which will arouse and maintain the public's interest and attention in the same manner that "conflict" arouses and maintains interest in drama. In short, under our competitive private enterprise

system of broadcasting, no profit-motivated broadcaster could prosper by sacrificing community and listener acceptance at the altar of "unfairness."[28]

We recognize that the above conclusion will bring forth protests in somewhat the following form: Admitting
149 that the vast majority of broadcasters operate under a high journalistic ethic of fairness and objectivity and that the profit-making motive of the broadcaster carries with it inherent forces of moderation and fairness, what about the bad apples in the barrel? What is to be done about the Dr. Shulers[29] who use their stations to make defamatory attacks and to engage in anti-Catholic and anti-Semitic tirades? What about the Southern broadcast station which broadcasts nothing but segregationist viewpoints? Or what about the station

[28] Strangely enough, broadcasters are far more often criticized for being bland, inoffensive, innocuous and unwilling to take a strong stand in the broadcast of public affairs programming than of being unfair. If such accusations are justified, one thing is certain: namely, that Section 315 and the fairness doctrine have encouraged their development, which leads to the query whether one of the most significant benefits the Commission might bestow upon the ideal of an informed electorate might be the abolishment of the fairness doctrine and the establishment of a constitutionally-approved "hands-off" policy encouraging vigorous, one-sided editorial advocacy by stations on important public issues of the day, unblunted by the moderating influence of the fairness doctrine, with ultimate reliance upon the aggregate of competing stations and other media to fill in the "other sides" with equally vigorous one-sided advocacy. Certainly, this would assure greater unfettered interchange of ideas than is now the case where broadcasters are assigned the hybrid role of moderator and advocate without being able to play either role wholeheartedly because of fear of Commission intervention.

[29] *Trinity Methodist Church, South* v. *FRC*, *supra* note 1. In commenting upon the Shuler decision, a former law school professor stated: "The amazing thing about *Trinity* is that the District of Columbia court decided the case as it did, despite the Supreme Court's holding in *Near* v. *Minnesota* [283 U.S. 697 (1931)], decided within the year. Difficult as it is to distinguish the facts in *Near* from *Trinity*, one cannot deny the different results. The circuit court could have reached correctly its decision only if the first amendment were not applicable to radio." Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 Geo. Wash. L. Rev. 719, 758 (1964).

owner who orders his news staff to slant the news so as to favor some viewpoints and public officials and to discredit others? If broadcasting is to operate in the public interest, is it not necessary for the Commission to suppress such excesses and abuse? Fortunately, perhaps, wiser heads and more authoritative voices than ours have answered these emotion-packed questions in a manner which makes them far more rhetorical than one might assume at first blush.

As stated by the Supreme Court in *Cantwell* v. *Connecticut*:[30]

> "To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."

150 As Madison had observed:

> "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press."[31]

Despite this, "the Constitution specifically selected the press . . . to play an important role in the discussion of public affairs." It was a "constitutionally chosen means * * * thoughtfully and deliberately selected" by the framers of our Constitution "to improve our society and keep it free."[32]

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[30] 310 U.S. 296, 310 (1940).

[31] Quoted in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964).

[32] *Mills* v. *Alabama*, 34 U.S.L. Week 4418, 4419 (U.S. May 23, 1966).

Although it was recognized that abuses and excesses by the press were inevitable, the framers of the Constitution early determined that such abuses and excesses must be brought within the mantle of protection of the First Amendment if the freedoms of expression were to have the "breathing space" that they "need . . . to survive."[33]

It is noteworthy that the framers of our Constitution were not acting out of naivete when they decided to bring abuses and excesses by the press within the mantle of protection provided by the First Amendment. Prior to the adoption of the First Amendment, in the period immediately before and after the Revolution, the American press became increasingly partisan and often scurrilous.[34] The framers of the Constitution, such as Jefferson, Hamilton, Franklin and Madison, were all subjected to scurrilous personal attacks by the press. Furthermore, in this period, which is often referred to as the period of the "party press," most newspapers were either Federalist or
151 Republican in their approach and were devotedly one-sided. The early history of this "new and rather wild journalism"[35] should give pause to those who argue that restrictions may be placed on the press in the name of "fairness." The First Amendment was adopted to prevent restrictions from being placed on newspapers which individually were clearly one-sided and were thought to be legitimately so. The "truth" was left to be found by citizens in a market place composed of *all* opinion sources. Ben Franklin had stated that his newspaper was not a stagecoach, with seats for everyone.[36] It was

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[33] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964); *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

[34] The historical background in this paragraph is based on Mott, American Journalism 71-162 (3d ed. 1962).

[35] *Id.* at 143.

[36] *Id.* at 55.

Franklin's point of view that prevailed and not that of the Royal Governor who in 1770 complained of the radical and influential Boston Gazette: "The misfortune is that some seven-eighths of the people read nothing but this infamous paper."[37]

Thus, there were plenty of journalistic abuses and excesses at the time the Constitution was being framed, which prompted a contemporary to observe that "the American press has been abominably gross and defamatory."[38] But this was accepted by the constitutional framers as the price of a press free of government intervention. Madison's Report on the Virginia Resolutions expressed this concept eloquently, when, after referring to the abuses of the press, he went on to say:

> "It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which
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> 152 have been gained by reason and humanity over error and oppression . . . ."[39]

In thoughtfully and deliberately selecting the press to improve our society, the founding fathers decided, on balance, that the ultimate public interest would be better served by permitting the abuses and excesses of the Shulers and their ilk to exist and even thrive under the mantle of protection of the First Amendment than it would be to permit the

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[37] *Id.* at 75.

[38] *Id.* at 146.

[39] Quoted in *Near* v. *Minnesota*, 283 U.S. 697, 718 (1931); see *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940); *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940).

government to prune them away at the danger of injuring the vigor of that part of the press yielding proper fruits. Fearing the occasional tyrannies of government far more than the occasional abuses and excesses by the press, they amended the Constitution so that free speech and press should be guaranteed. Since this ultimate public interest determination was incorporated into the First Amendment, it cannot now be altered by legislative or administrative tampering, no matter how much the Commission may differ with the public interest conclusions on this point embraced by the First Amendment.

III

Discussion of Specific Constitutional Considerations

Up to this point, we have requested the reader to accept, *arguendo*, certain constitutional principles[40] without further support or documentation. Among these is what we have designated as the threshold constitutional standard which we contend must be met to support the constitutionality of the fairness doctrine and Section 315; namely, that such restraints are constitutionally justifiable
153 only if a serious and substantial threat to our social order is imminent to a high degree—that is, we are faced with a clear and present danger. We have previously shown that, as a matter of fact, no clear and present danger of an extremely serious substantive evil exists justifying this type of government interference. The "evils" upon which the Commission apparently relies are highly speculative in terms of both imminence and seriousness. As we have further shown, there is not even a significant history of evils from which the Commission may draw support. At this point we will discuss and document our contention that the "clear and present danger" standard is a mini-

[40] See generally Sullivan, *Editorials and Controversy: The Broadcaster's Dilemma*, 32 Geo. Wash. L. Rev. 719 (1964).

mum compulsion of the First Amendment which must be met before the Commission or Congress may justify the interference with speech and press manifested by Section 315 and the fairness doctrine.

A. The Clear and Present Danger Doctrine

The Supreme Court has generally recognized that the freedom guaranteed by the First Amendment is subject to some limitation, such as where speech is uttered "in such circumstances or of such a nature as to create a clear and present danger" that it would bring about "substantive evils" within the powers of government to prevent.[41] However, in holding that the protection of the First Amendment is not absolutely unlimited, the Court has emphasized that "the limitation has been recognized only in exceptional cases."[42]

In *Bridges* v. *California*, 314 U.S. 252 (1941), the Supreme Court described the clear and present danger doctrine as

"a working principle that the substantive evil must
154 be extremely serious and the degree of imminence extremely high" before government interference will be warranted.[43] Justice Rutledge's classic exposition of the clear and present danger doctrine in *Thomas* v. *Collins*[44] also warrants repetition:

"The case confronts us again with the duty our system places on this Court to say where the indi-

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41 *Schenck* v. *United States*, 249 U.S. 47, 52 (1919); see *Wood* v. *Georgia*, 370 U.S. 375 (1962); *Bridges* v. *California*, 314 U.S. 252 (1941); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

42 *Near* v. *Minnesota*, 283 U.S. 697, 716 (1931).

43 314 U.S. at 263. The Court also emphasized that the clear and present danger doctrine does not "purport to mark the furthermost constitutional boundaries of protected expression" but does "no more than recognize a minimum compulsion of the Bill of Rights." *Ibid.*

44 323 U.S. 516, 529-30 (1945).

vidual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. * * * That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. * * *

"For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly."

155 We challenge that anyone, on the basis of fact and logic, could rationally conclude that the success and viability of our democratic institutions are seriously and immediately threatened because the electorate is deprived of balanced and multi-sided information on political and social issues to a degree which would warrant the dubious intrusions of government through Section 315 and the fairness doctrine. It is sophistry to pretend that any dangers

the Commission may perceive as grounds for application of the fairness doctrine are other than doubtful, remote and highly speculative in terms of either imminence or seriousness. Plainly, neither the fairness doctrine nor the equal opportunity provisions of Section 315 can be reconciled with the clear and present danger doctrine which stands at the threshold as a minimum compulsion of the First Amendment preventing otherwise dubious intrusions by government into the field of communications.

The Supreme Court's recent decision in *Mills* v. *Alabama*[45] unconditionally condemned a "fairness" concept as a "reasonable" justification for impinging upon the First Amendment. In short, the Court implied that an abstract need for fairness did not meet the clear and present danger test. Thus, the state had defended a statute outlawing editorials on the grounds that it promoted fairness by avoiding confusing last-minute charges and countercharges which could not be answered until after the election was over.[46] Referring to this "fairness" defense, the Supreme Court stated:

> "We hold that no test of reasonableness can save a state law from invalidation as a violation of the First
> 156 Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election."[47]

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[45] 34 U.S.L. Week 4418 (U.S. May 23, 1966).

[46] The Alabama Supreme Court, in sustaining the statute prohibiting editorials, stated: "It is a salutary legislative enactment that protects the public from confusive last-minute charges and countercharges and the distribution of propaganda in an effort to influence voters on an election day: when as a practical matter, because of lack of time, such matters cannot be answered or their truth determined until after the election is over." 278 Ala. 188, 195-196, 176 So. 2d 884, 890.

[47] 34 U.S.L. Week at 4420.

If a fairness concept would not serve as a rule of reasonableness which could save the Alabama law prohibiting editorials from invalidation as a violation of the First Amendment, as the Supreme Court found, we submit that the Commission's fairness doctrine likewise cannot serve as a justification for invading the freedoms of speech and press protected by the First Amendment, since the Court has held that "no test of reasonableness" can save a law resulting in such an invasion.

The *Mills* decision contained other far-reaching implications involving the Commission's regulatory approach toward station editorialization and its application of the fairness doctrine. At the outset, we believe that the *Mills* decision cannot be reconciled with the Commission's action in the *Mayflower* case, which led to a nine-year flat prohibition of editorialization. Further, even when the Commission did permit stations to editorialize, in its report on editorialization in 1949, it refused to acknowledge the unconstitutionality of the *Mayflower* prohibition, but rather permitted editorialization under its construction of the fairness doctrine.[48] Thus, the Commission tacitly reserved the right to reinstate the flat prohibition of the *Mayflower* decision if it found it in the public interest to do so. The Commission's continued assertion of power over editorialization stands as a threat to silence broadcast editorials at the whim and caprice of the Commission, absent any admitted constitutional restraint. The exercise of such power over editorials may not be reconciled with the conclusion of the *Mills* decision that "suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution

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[48] See Editorializing Report, 25 R.R. 1901, 1914 (dissenting opinion of Commissioner Jones).

thoughtfully and deliberately selected to improve our society and keep it free. * * * It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press."[49]

At this point we will turn to the discursions that so often have aborted attempts to face up to the clear and present danger doctrine. However unavailing they are, it seems that they must be dealt with.

B. Rationalizations Attempting To Circumvent the Application of First Amendment Protections to Broadcasting Are Specious

Whenever broadcasters contend that they are entitled to the same constitutional protection as any other media making up the constitutionally-protected press, exponents of government interference respond that broadcasting is "different" and that the protections of the First Amendment do not easily translate into the environment of the broadcast media. The "differences" usually offered are that there is a physical limitation on broadcast facilities, that broadcasters must be licensed, that broadcasting is a privilege, that the public owns the airways, and a host of other sophistries. As we shall demonstrate, these contentions that the First Amendment's protection of broadcasting is "different" than its protection of other media of mass communications are without merit.

1. The "Scarcity" Argument

One of the principal grounds advanced to prove the thesis that radio and television are "different" is that the limited spectrum space leads to physical limitations which warrant a different application of the First Amendment protections to the field of broadcasting than to other mass

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[49] 34 U.S.L. Week at 4419.

media. The *physical* limitation of the radio and
158 television spectrum is often contrasted to the potentially infinite number of newspapers and magazines as grounds for different treatment under the First Amendment. This is sophistry for two reasons.

In the first place, with many cities having only one daily newspaper and thousands of others having none, it is generally conceded that there is a shortage of daily newspapers in the United States. Today there are three times as many radio and television stations (6,347) as there are daily newspapers (1,763). If scarcity is justification for setting aside the protections of the First Amendment, it would thus necessarily limit the First Amendment's applicability to newspapers even more than in the case of broadcasting stations. However, no one has had the temerity to suggest that newspapers have lost any of their rights under the First Amendment because of the recently experienced and accelerating shortage of newspapers.[50]

In the second place, the Commission has allocated over 1800 UHF and VHF television channels to approximately 1200 communities. However, there are only 718 commercial and educational stations on the air. Under these circumstances, it is difficult to conclude that the shortage of spectrum space has acted as any real brake upon the expansion of television stations. The real limitation on the expansion of radio and television has been economic rather than physical, as the Commission has often recognized. Aside from this, the physical limitation becomes even more of an abstract irrelevancy when the fact is considered that there are three times as many radio and television stations as there are daily newspapers. As one commentator noted

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[50] If it becomes economically viable, as it is already technically feasible, to distribute newspapers by facsimile, it is difficult to assume that the Commission would utilize the scarcity argument to justify interference with such facsimile distribution to the extent that it has applied the argument to broadcasting.

in this regard, "Even if we were to give some constitutional respectability to the numbers game, and limit ourselves to comparing daily newspapers to television stations, we rapidly face the fact that even today each metropolitan area generally has more television stations than newspapers."[51] After making a thorough analysis of the inadequacies of the scarcity argument, he summarized his conclusions on this issue as follows:

> "At any event, all mass media are limited and the limitations are essentially economic; no discussion can alter that fact. If limitation, for whatever reason, can limit freedom, then freedom must be limited for all mass media. In short, to the argument that radio and television are different, one might ask: Different from what? How different? Is the difference significant? Until a better argument than the totally irrelevant physical limitation factor is offered, we suggest that freedom is too important to be sacrificed because of an ancient myth. The fable of 'difference' ought to be immediately reviewed and classified for what it is."[52]

We submit that this thesis is irrefutable.

2. The "Powerful Voice" Argument

Lurking behind the scarcity argument is the sentiment sometimes expressed that broadcasting is such a powerful voice that to permit it to operate under the full protections of the First Amendment would place broadcasters in a position to unduly influence public opinion.

In the first place, the more than six thousand broadcast stations are not "a powerful voice" because they do not speak as one voice. Diversity of ownership effectively precludes any such uniformity since the thousands of

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[51] *Sullivan, op. cit. supra,* note 40, at 759.

[52] *Id.* at 761.

broadcast station owners represent a wide cross-
160 section of political, regional, religious, economic and social beliefs. These stations compete with each other and with a flood of other media.

In the second place, it would be a philosophical anomaly to hold that full and free discussion and exposition of ideas and issues can be achieved by confining the liberty to speak to the weak while limiting, conditioning or silencing the strong. It does not tax reality to suggest that uniformly the most powerful voice that speaks on such issues is government itself. It was one of the purposes of the First Amendment to provide a counter to the power of government. As Justices Douglas, Warren and Black stated in reaching (as the majority did not) the constitutional issue presented by the Corrupt Practices Act:

> "Some may think that one group or another should not express its views in an election *because it is too powerful,* because it advocates unpopular ideas, or because it has a record of lawless action. But these are not justifications for withholding First Amendment rights from any group—labor or corporate. * * * First Amendment rights are part of the heritage of all persons and groups in this country.[53]

Justices Douglas and Black further stated in a movie censorship case:

> "Motion pictures are of course a different medium of expression than the public speech, the radio, the stage, the novel, or the magazine. But the First Amendment draws no distinction between the various methods of communicating ideas. On occasion one may be more powerful or effective than another. * * * Which medium will give the most excitement and have

[53] *United States* v. *International Union,* 352 U.S. 567, 597 (1957) (dissenting opinion) (emphasis added).

the most enduring effect will vary with the theme and the actors. It is not for the censor to determine in any case."[54]

161 It would be anomalous, indeed, to conclude that, because broadcasting may be a highly or "more" effective means of communication, its effectiveness *per se* could be used as grounds for depriving it of First Amendment protections.[55]

3. The "Licensing" Argument

One of the more specious reasons—bootstrap in nature—offered for limiting or not even applying the First Amendment to radio and television is that these communications media, as a physical imperative, must be licensed under the public interest standard and that this necessity, in some way, supersedes or qualifies the safeguards of the First Amendment. While the Supreme Court in the *NBC* case[56] indicated that an unsuccessful applicant for a license was not, by this circumstance alone, deprived of his rights under the First Amendment, it is an over-extension of this obvious conclusion to further conclude that if a license is granted the licensee thereby and thereupon forfeits the protections of the First Amendment. Such a view would construe the commerce clause as vesting in Congress the

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[54] *Superior Films* v. *Dept. of Education*, 346 U.S. 587 (1954) (concurring opinion).

[55] Aside from the fact that Congress, by virtue of its power over commerce, was a midwife at the birth of broadcasting and thereafter its taskmaster, one may assume that broadcasting's effectiveness, as much as anything else, led Congress to forcing the equal opportunity provisions of Section 315 upon the broadcast industry even though we assume the Commission does not seriously believe that newspapers could be forced to give equal space in their pages to opposing candidates. It is apparent, however, that if the First Amendment permits such compulsion to be applied to broadcasters, it could with like legality be applied to newspapers and other communication media, unless there are "grandfather rights" under the First Amendment.

[56] *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

power to nullify the First Amendment. Realizing that censorship dangers inhere in the exercise of legislative or administrative licensing powers, the Supreme Court has made it quite clear that it will exercise extraordinary vigilance over any licensor in order to make certain
162 that he does not exercise the licensing function in a manner which will violate the free speech and press guarantees of the First Amendment.[57]

A related argument is sometimes advanced that a license is a "privilege" and not a "right"[58] and that this in some manner deprives the licensee of his First Amendment rights. Implicit in this argument is the corollary assumption that "unconstitutional conditions" may be imposed on the grant or retention of a privilege. However, it is firmly established that the government may not condition the grant of privileges upon the relinquishment of constitutional rights. This proposition was unequivocally stated by the Supreme Court in the case of *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963), wherein it was stated, "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial or placing of conditions upon a benefit or privilege." As further stated by the Court in *Hannegan* v. *Esquire*, 327 U.S. 146, 156 (1946): "[G]rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. * * * Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated."

Section 315 conditions the right of a broadcaster to carry a discussion by one political candidate upon his granting

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[57] See *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Hannegan* v. *Esquire*, 327 U.S. 146 (1946).

[58] See statement of then Chairman Newton N. Minow in Freedom and Responsibility in Broadcasting 173 (Coons ed. 1961).

all opposing candidates equal time. The Commission's fairness doctrine and editorial policy condition the right of a broadcaster to present one side of a controversial issue upon his presenting all other significant sides of the same issue. That such a condition upon communications denies liberty is beyond doubt. As stated in *Near* v. *Minnesota*:[60]

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> "[I]t does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions [defamation]. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made."

In short, if a broadcast station has the right, without previous ~~restraint~~, to broadcast one side of an issue, this right cannot be made dependent upon a condition that it broadcast something else, more or less, on the other side. Further, since the Supreme Court's recent decision in *Mills* v. *Alabama*,[61] which struck down as unconstitutional an Alabama statute which, *inter alia*, made it a crime for a newspaper to editorialize in support of a candidate on election day, we do not assume that anyone would seriously argue that a broadcast station does not have the constitutional right to editorialize in support of a political candidate. As indicated by the principle laid down in *Near*, if a broadcast station has the right, without previous restraint or fear of subsequent punishment, to editorially

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[59] *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Hannegan* v. *Esquire*, *supra* note 57; *Terral* v. *Burke Construction Co.*, 257 U.S. 529 (1922). See Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960); Hale, *Unconstitutional Condition and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935).

[60] 283 U.S. 697, 720 (1931).

[61] 34 U.S.L. Week 4418 (U.S. May 23, 1966).

endorse a candidate, this right cannot be conditioned upon or made dependent upon its broadcasting something else, more or less.

4. The "Public Domain" Argument

A further excuse offered for government invasion into the field of broadcast programming is that the "public owns the air waves" and that the broadcasters' use of this public property is, therefore, subject to greater exemptions from the protections of the First Amendment
164 than might otherwise be the case. This excuse has an obvious defect because if the use of the public domain deprives a communications media of a right to be free from government censorship, then what media today can be free? In short, if the use of public property does not distinguish radio and television from other communications media, the assertion adds nothing to justify broadcasting being treated differently.

All communications media use the publicly-owned postal system; all to a greater or lesser extent use public highways, streets, and airways; all do this under government regulation and many pursuant to a license or permit. Thus, few printed media could survive without a permit to use the second-class mails. Streets, parks, and halls in many cities cannot be used for meetings or speeches without permits from city authorities. The fact that newspaper, magazines, and other forms of communications use these publicly-owned facilities has never been grounds for permitting government to interfere with the dissemination of information by these media. Indeed, as the court emphasized in *Hannegan* v. *Esquire*,[62] the fact that public property such as the post office facilities are used for dissemination of information by the press requires extraordinary precautions to assure that the government does not, as a price

[62] 327 U.S. 146 (1946).

of private use of such public facilities, attempt to invade protections of the First Amendment.[63]

The explosions of the electronic age have made our society of complex and private persons and activities so interdependent that the creation of public thoroughfares for private use is a major and imperative undertaking of government, as it always has been to a degree.
165 To say that the liberties of speech and press cannot survive their use of such public thoroughfares is to say that they could exist, if at all, only in the old-fashioned ante-electronic age. But the courts, with great vigilance, have fought to dispel the idea that old-fashionedness or uselessness is any part of the character of the First Amendment. Rather, they emphasize that the First Amendment is capable of adaptation to each new fashion of communication—which must be if all other liberties we prize are to survive:

> "If we ever agree that modern mechanical devices and modern mass interest in public affairs have destroyed the validity of those [First Amendment] principles, we will have lost parts of the foundation of the Constitution." [64]

5. The "Content" Argument

One of the most time-honored excuses offered for Commission intrusion into broadcast programming is that the

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[63] Furthermore, employment in a business in the public domain cannot be conditioned upon adherence to unconstitutional government commands. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (religious oath for notary public); *Wieman* v. *Updegraff*, 344 U.S. 193 (1952) (state employees loyalty oath). *Cf. Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939): streets and parks "have immemorially been held in trust for the use of the public . . . ."

[64] *Rumely* v. *United States*, 90 U.S. App. D.C. 382, 393, 197 F. 2d 166, 177 (1952), *aff'd on other grounds*, 345 U.S. 41 (1953). See also discussion and cases cited in Part I, *supra*.

Commission does not censor, because it only examines and weighs the "overall programming" to determine the good judgment and good faith of the licensee in applying the fairness doctrine, without going into the content of particular programs. It is impossible, however, to conceive how the Commission might determine whether a licensee was living up to its fairness doctrine without looking at the content of the licensee's programs. How otherwise might the Commission determine whether an issue was controversial, whether a balanced multi-sided presentation had been made, or whether a statement constituted a personal attack? The Commission itself, in its Editorializing Report, recognized that it might be "called upon to weigh conflicting evidence to determine whether the licensee has or has not made reasonable efforts to present a fair and well-rounded presentation of particular public issues."[65] What evidence will the Commission weigh other than the content of the programs containing the particular public issue? It is difficult to imagine a more strenuous type of censorship over content being exercised than that in which the Commission would indulge if it were to place any broadcaster on trial for violating the fairness doctrine.

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6. The "Prior Restraint" Argument

Perhaps the most specious of all the arguments advanced to support Commission intrusion into programming is that the First Amendment applies only to "prior restraints" but does not apply to "subsequent punishment." In short, it is argued that, since the Commission does not require broadcasters to submit the content of programs for approval prior to broadcast, but leaves the broadcaster

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[65] 25 R.R. 1901, 1911.

free to broadcast what he may desire, subject only to such subsequent punishment as the Commission may choose to apply if the Commission disagrees with what he has broadcast, there is no "prior restraint" and, hence, no violation of the First Amendment.[66] The fact that the broadcaster may have his license renewal application denied, or be required to face revocation of license proceedings, forfeiture penalties, or cease and desist orders as a subsequent punishment if his programming does not meet Commission standards, whatever they may be, is totally ignored as a source of unconstitutional restraint by those advocating this unique position.

However, it has been clear since *Near* v. *Minnesota,* 283 U.S. 697, 715 (1931), that freedom of speech and press might be " 'rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities
167 might nevertheless punish him for harmless publications.' 2 Cooley, Const. Lim. (8th ed.) pp. 885." As the eminent administrative law authority Professor Louis L. Jaffe once pointed out to Chairman Minow during a symposium on freedom in broadcasting, no such distinction between prior restraints and subsequent punishments may be properly made under the First Amendment to the Constitution, since the Supreme Court has abandoned such distinctions.[67]

Thus, the Supreme Court, since *Near* v. *Minnesota,* has ignored this distinction and has tested the validity of government interference by its operation and effect. If the scheme of regulation serves to restrain or inhibit free

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[66] Former Chairman Newton N. Minow has been among others who have advanced this contention. See *Freedom and Responsibility in Broadcasting* 172-74 (Coons ed. 1961).

[67] *Op. cit. supra* note 66, at 172-74.

speech and free press, the scheme is unconstitutional. This is true whether the restraint or inhibition is coerced by government by direct prior restraint or by indirect prior restraint flowing from threat of subsequent punishment. It applies whether the restraint or inhibiting effect is direct or indirect and, indeed, even if such restraining influence is unintended by government.[68]

Applying these constitutional principles to the fairness doctrine, the Commission's editorialization policies and the equal opportunity provisions of Section 315, it is beyond a doubt that the regulatory scheme effects a real and substantial restraint and inhibiting effect upon the exercise of the freedom of the press guaranteed by the First Amendment. The Commission's fairness doctrine and the proposed rules here being considered are clearly "instruments of regulation" and have been accepted by the broadcast industry as such. The present and intended weapons of formal and informal sanctions by the Commission for the purpose of forcing compliance with its "fairness" concepts are clearly coercive. Broadcasters cannot be
168 expected to lightly disregard thinly-veiled threats of denial of their renewal applications, possible revocation proceedings or monetary forfeiture penalties if they do not come around to the Commission's views on fairness. The broadcasters' "self-censorship' 'in the area of controversial and political issues, compelled and defined in scope by Congress and the Commission, is no less virulent because it may be privately administered by broadcasters out of fear and timidity than if the Commission applied flat prohibitions against editorialization and adopted similar compulsions as to what broadcasters may or must broadcast. The Commission's fairness policies and the

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[68] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Smith* v. *California*, 361 U.S. 147 (1959); *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Near* v. *Minnesota*, 283 U.S. 697 (1931).

equal opportunity provisions of Section 315 clearly deter broadcasters from selecting all those programs which they desire to broadcast, because of doubt of whether they could prevail in retaining, their license free of sanction if they exercise such freedom of selection or because of fear of the delay and expense of having to undergo lengthy litigation in order to establish their right to do so. In sum, the Commission's fairness doctrine and Section 315 have consistently served to dampen the vigor and limit the variety of electronic-press reporting in a manner which is inconsistent with the First Amendment.

7. The "Private Restraint" Argument

In rationalizing the constitutionality of the fairness doctrine in its Editorializing Report, the Commission stated:

> "The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear *and free alike from similar restraints by private licensees.*"[69]

Through this reference to "similar restraints" by a private licensee, the Commission spuriously attempted to
169 shift the onus of the abridgement of freedoms of the press resulting from its own actions by implying that a private licensee could be guilty of unconstitutional abridgement of speech and the press if the licensee failed to give the public access to all sides of public questions.

Admittedly, one of the paramount interests protected by the First Amendment is the public's access to a free flow of information and ideas. However, the First Amendment protects this paramount interest only from interfer-

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[69] 20 R.R. at 1912 (emphasis added).

ence by governmental action and not from action by private persons. This principle was applied specifically to broadcasting in the *McIntire* case,[70] involving a station's refusal to carry certain sponsored religious programs, wherein the court stated:

> "[T]he First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government. The defendant [broadcast station] is not an instrumentality of the federal government but a privately owned corporation. The plaintiffs seek to endow WPEN with the quality of an agency of the federal government and endeavor to employ a kind of 'trustee-of-public-interest' doctrine to that end. But Congress has not made WPEN an agency of government. For this court to adopt the view that it has such a status would be judicial legislation of the most obvious kind."

Thus, the Commission cannot excuse its own invasions and restraints upon the freedoms protected by the First Amendment on the grounds that such invasions are necessary to prevent First Amendment "abridgments" by the private broadcaster. Whatever interests of the public may be protected by the First Amendment, they are only protected from action by government. No court has ever accepted the Commission's implication that the refusal of a licensee to air all sides of a public issue is itself a denial of First Amendment rights to the American people. If this unique concept were accepted, not only broadcasters but all other communications media would be required to present the "other side" as a constitutional condition precedent to taking a public position on any controversial issue or to giving editorial en-

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[70] *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597, 601 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

dorsement or other exposure to any political candidate. The fact is, however, that the press protections of the First Amendment embrace the right of the press to speak unfairly, one-sidedly, even falsely, or not at all. A requirement of fairness is contrary to

> "the theory of our Constitution . . . that every citizen may speak his mind and every newspaper express its view on matters of public concern and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, *unfair*, false, or malicious."[71]

While the press in general certainly has strong moral and ethical obligations to provide fair and objective reporting on information essential to an informed electorate, these moral and ethical obligations have not yet been converted into a *legal* obligation by the First Amendment.[72]

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One final note should be added to this discussion. The Supreme Court has recently encouraged "uninhibited, robust and wide-open" debate on public issues by eliminating the private action against the press for libel, in the absence of actual malice, as an unwarranted obstacle
171 to such debate.[73] It is somewhat incongruous to find that the Commission at the same time is adding new obstacles to "uninhibited, robust and wide-open" de-

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[71] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 298-99 (1964) (concurring opinion of Goldberg, J.) (emphasis added).

[72] As Justices Black, Douglas and Rutledge have noted: "[I]t assumes the impossible" to suppose that mass media, including radio, would at all times be equally fair "as between the candidates and officials they favor and those whom they vigorously oppose." The Justices stated that, for this reason, all media should be equally free so as to combat error in one another. *Kovacs* v. *Cooper*, 336 U.S. 77, 103 (1949) (dissenting opinion).

[73] *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).

bate by creating a new personal action against the electronic press; namely, the right of a person personally attacked during an uninhibited debate to assert an absolute right to use the station's microphone and time for reply, and the right of a spokesman for an opposing political candidate to assert an absolute right to use the station's microphone and time if the station endorses another political candidate. In the final analysis, if free speech has the function of providing that "debate on public issues should be uninhibited, robust and wide-open, and that it may well include vindictive, caustic and sometimes unpleasantly sharp attacks on government and public officials,"[74] how is that function served if, as is the case, broadcasters are often timid in involving themselves and their stations in discussions of controversial issues, editorialization and discussions by political candidates because of regulations designed to promote fairness? If the Supreme Court could find that the constitutional guarantees of the First Amendment required a federal rule denying to public officials[75] a cause of action against the press for libel because of the restraining influence such libel suits may have upon wide-open discussion, the underlying principle would dictate that the Commission should eliminate the burdens of its fairness doctrine.

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[74] *Id.* at 270.

[75] The *New York Times* doctrine may extend to libel actions by other than public officials. See *Rosenblatt* v. *Baer*, 383 U.S. 75, 84 n. 10, 86 n. 12, 88-91 (1966); *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659, 671 (2d Cir. 1964) (Friendly, J.), *cert. denied*, 379 U.S. 968 (1965); *Afro-American Publ. Co.* v. *Jaffe*, U.S. App. D.C. No. 18363, decided May 27, 1965 (concurring opinion) (reargued *en banc* Oct. 18, 1965); *Pauling* v. *National Review, Inc.*, 34 U.S.L. Week 2575 (N.Y. Sup. Ct., New York Cty., decided April 21, 1966).

172 IV

EVEN IF A CONSTITUTIONAL POWER TO REQUIRE "FAIRNESS IN BROADCASTING RESIDES IN CONGRESS, THE STATUTORY PROVISIONS UPON WHICH THE COMMISSION RELIES AS AUTHORIZING IT TO PROMULGATE THE FAIRNESS DOCTRINE ARE UNAVAILING BECAUSE THEY ARE VAGUE AND LACK EXPLICITNESS

Thus far it has been contended that both Section 315 and the fairness doctrine are beyond the constitutional power of the Congress and of the Commission. In this section it is further contended that, even if such a power resides in Congress, the statutory provisions upon which the Commission relies as authority for the fairness doctrine are defective on either of two separate grounds: (1) the statutory provisions upon which the Commission relies as its authority to promulgate the fairness doctrine fail to meet constitutional requirements of narrowness and preciseness, and thus cannot be used as authority for the Commission to tinker with First Amendment rights; and (2) the statutory provisions upon which the Commission relies as its authority to promulgate the fairness doctrine are not sufficiently explicit to establish that Congress *intended* to authorize the Commission to tinker with First Amendment rights.

A. Unconstitutional Vagueness

It is firmly established that a vague statute regulating conduct and touching upon First Amendment rights is unconstitutional. The Commission bases its fairness doctrine upon such vague provisions of the Communications Act. This vagueness, with its implications of sweeping authority in the Commission, inhibits protected speech; it makes possible Commission arbitrariness; and it effectively precludes judicial review.

173 The defects of the statute are demonstrated and compounded by the practice of the Commission under

the fairness doctrine in general, and now through the proposed rule. The vagueness persists; it has produced Commission inconsistencies and arbitrariness (particularly in regard to unpopular but clearly controversial causes); and it is only a rare licensee who thinks it useful to raise a challenge—administrative or judicial—to a ruling by the Commission or its staff.

1. The Statutory Provisions Relied Upon By The Commission Are Too Vague To Permit Commission Impingement Upon First Amendment Rights

The Commission has based its authority for the "fairness doctrine" upon the "public interest, convenience, and necessity" requirements in the Communications Act, and, since 1959, upon that clause of Section 315(a) which recognizes an obligation of the licensee to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." See FCC "Fairness Primer," 29 Fed. Reg. 10416, 2 R.R. 2d 1901, 1903 (1964). Neither of the quoted standards is self-defining, and both suffer from the same vice of vagueness which has prompted the Supreme Court to strike down legislation which impinges upon the First Amendment area and vests virtually uncontrolled discretion in administrative officials.[76]

Even if Congress intended the Commission to issue rules and regulations to effectuate the vague Congressional standards, such power cannot constitutionally be bestowed upon administrative officials when First Amendment rights are so intimately involved.

174 "[T]he line between speech unconditionally guaranteed and speech which may legitimately be regu-

[76] *E.G. Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938).

lated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for more sensitive tools . . . ."[77]

The evils of such a sweeping standard, especially where First Amendment rights are involved, have been cited often by the High Court. Vagueness in a statute or rule bearing on speech causes the speaker to "'steer far wider of the unlawful zone' Speiser v. Randall, 357 U.S. 513, 526 . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964). Therefore, statutes restrictive of First Amendment freedoms "must be narrowly drawn to meet the precise evil the legislature seeks to curb," and "the conduct proscribed must be defined specifically so that the person or persons affected remain secure and unrestrained in their rights to engage in activities not encompassed by the legislation." *United States* v. *C.I.O.*, 335 U.S. 106, 142 (1948) (Rutledge, J., concurring), quoted approvingly in *Baggett* v. *Bullitt*, *supra*, 377 U.S. at 372 n. 10.[78]

A vague statute of the nature here in question not only inhibits legitimate speech, but it provides a cloak for the exercise of arbitrary power by administrative officials. (See cases cited at note 76, *supra*.) "It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes." *NAACP* v. *Button*, 371 U.S. 415, 435 (1963). The Commission has *in fact* applied the "vague and broad statute" in a discriminatory manner.

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[77] *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), quoted in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963).

[78] See also *Ashton* v. *Kentucky*, 34 U.S.L. Week 4398 (U.S. May 16, 1966); *NAACP* v. *Button*, 371 U.S. 415 (1963); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961); *Cantwell* v. *Connecticut*, *supra* note 76; *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

The proposed rule on its face discriminates against "foreign groups or foreign public figures" (§ 73.123(b)). The fairness doctrine as applied discriminates openly against atheists, *Mrs. Madalyn Murray*, 5 R.R. 2d 263 (1965), and communists (and the "communist viewpoint"), FCC "Fairness Primer," 29 Fed. Reg. 10416, 10417-18, 2 R.R. 2d 1901, 1908 (1964). In a dissenting opinion in the *Murray* case, Commissioner Loevinger noted the Commission's application of the fairness doctrine to assure contrasting *religious* viewpoints but not a contrasting *atheistic* viewpoint. He thought that the conflicting cases "suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are involved. This anomaly simply emphasizes the error of the Commission's whole approach to this subject." 5 R.R. 2d at 269. See Appendix B. The Commission is not unlike the censor whose broad authority was held unconstitutional in *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-05 (1952); "[T]he censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies."

It is worth noting that the Commission, in a series of events of which the latest is the *Murray* case, has retreated under public pressure from its early ruling informing licensees that they must provide time to spokesmen for atheism, *Robert Harold Scott*, 11 F.C.C. 372, 3 R.R. 259 (1946).[79]

Another example of Commission inconsistency and arbitrariness under the fairness doctrine is the line of rulings on the extent of the licensee's obligation to seek out responsible reply comments. Compare *The Evening News*

[79] See *Hearings Before the House Select Committee to Investigate the Federal Communications Commission Pursuant to H. Res.* 691, 80th Cong., 2d Sess. 181-88, 200 (1948); *Letter to Edward J. Heffron*, 3 R.R. 264-a (1948); *Robert H. Scott*, 5 R.R. 859 (1949); *Robert H. Scott*, 25 R.R. 349 (1963).

Ass'n., 6 R.R. 283 (1950) (licensee should allow discussion of labor side on public issue and "continue to make available its facilities" for management side); with 176 *Dominican Republic Information Center*, 16 R.R. 431 (1957) (network attempt to obtain other side on *Galindez-Murphy* case prior to broadcast was sufficient, and time need not be made available to the Dominican Republic after the broadcast); and with *Jefferson Standard Broadcasting Co.*, 17 R.R. 339 (1958) (licensee violated requirement of fairness doctrine by not making adequate presentation of other side of "pay-TV" controversy even though it had sought several spokesmen for that side and had kept offer open). These cases, also, suggest that the fairness doctrine might be applied in some proportion to the acceptability of the viewpoints to the Commission.

Moreover, in avoiding a patently unworkable situation, the Commission has apparently been forced to make an arbitrary distinction between types of program formats subject to the "personal attack" principle. It is generally understood that the principle is not intended to apply to a station's regular newscasts, where other persons' newsworthy and controversial charges of crime and corruption are constantly being reported.[80] If the reply time had to be provided in this situation, the station would either be hopelessly burdened from the effort and expense of seeking replies and providing air time for them, or it would have to forego a large part of its journalistic function. Yet, as the Commission reads the statute, Section 315(a) of the Act makes the total fairness doctrine applicable to news-type programming, and this fact places the Commission in a dilemma which casts more doubt on the legality of the fairness doctrine: either the personal attack principle

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[80] Such a distinction may be made in interpreting the vague expression "presentation of views" as used in the phrase "during the presentation of views on a controversial issue of public importance." (§ 73.123(a).) But is not a news report of other persons' views still a "presentation of views"?

makes impossible demands upon the broadcaster, further aggravating the abridgement of First Amendment rights, or by carving out an exception to that principle the Commission violates Section 315 which allegedly requires
177 an across-the-board application of fairness doctrine principles. The personal attack principle itself cannot be so narrowly construed. A news-program exception to the principle is inconsistent with the Commission's own rationale that "elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station . . . ." Notice of Proposed Rule Making, p. 1; FCC "Fairness Primer," 29 Fed. Reg. 10416, 10420, 2 R.R. 2d 1901, 1915 (1964); FCC Editorializing Report, 25 R.R. 1901, 1907 (1949). "[T]he licensee must be fully aware of the contents of the program, whatever its source or his actual involvement in the broadcast. The crucial consideration, as the Commission stated in Mapoles, is that, 'his broadcast facilities [have been] used to attack a person or group' (Letter of September 18, 1963 to Douglas A. Anello, FCC 63-850)." FCC "Fairness Primer," *supra*, 29 Fed. Reg. at 10421, 2 R.R. 2d at 1917. *Cf. Lar Daly*, 19 R.R. 1103 (1960). The only way the Commission can legally resolve this dilemma is by renouncing the entire personal attack principle. At the least, the selective enforcement of the principle points up the potential for arbitrariness inherent in the vague authority of the Communications Act.

Another defect in the fairness doctrine is that the overly-broad standards of the Communications Act effectively preclude judicial review in an area where constitutional freedom is in jeopardy. The Commission "is allowed, in essence, to define its own authority, to choose the direction and focus of its activities," because Congress itself has not made these decisions and the courts are powerless to make them. See *Watkins* v. *United States*, 354 U.S. 178, 205-06 (1957); *United States* v. *Peck*, 154 F. Supp. 603 (D.D.C.

1957) (both cases: defectively-broad mandates of congressional investigating committees).[81]

178 The statutory standards here involved are "completely lacking in . . . terms susceptible of objective measurement."[82] The phrases "public interest, convenience, and necessity" and "reasonable opportunity for the discussion of conflicting views on issues of public importance," have, to use words of the Supreme Court, "no ascertainable meaning either inherent or historical" (*Thornhill* v. *Alabama*, 310 U.S. 88, 100 (1940) (referring to the phrase "without a just cause or legal excuse")).[83]

Assuming that "fairness" is a constitutionally justifiable purpose in regulating speech in broadcasting, the definition of such terms as "reasonable opportunity," "conflicting views," and "issues of public importance," as well as such a nebulous term as "public interest," cannot be left to the Commission anymore than the definition of a "religious, charitable or philanthropic cause" could be left to the secretary of the Connecticut public welfare council in *Cantwell* v. *Connecticut*, 310 U.S. 296, 301-02 (1940). First Amendment rights are jeopardized where a government official may regulate speech, not as a ministerial function (*id.* at 306), but after "appraisal of facts, the exercise of judgment, and the formation of an opinion" (*id.* at 305).

The Commission may not distinguish its regulatory scheme on the ground that it is only used for the purpose

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[81] The latter case was said to have "constituted an even more serious threat to freedom of thought and expression. For these hearings consisted of the questioning of persons employed in the newspaper field, in radio and television." 154 F. Supp. at 605 (Youngdahl, J.).

[82] *Cramp* v. *Board of Public Instruction*, *supra* note 78, at 286.

[83] Compare *Staub* v. *City of Baxley*, 355 U.S. 313 (1958). (solicitation's "effects upon the general welfare of citizens of the City of Baxley" held to be a statutory test "without semblance of definitive standards or other controlling guides governing the action of the Mayor and Council in granting or withholding a permit").

of encouraging speech. The Commission has shown that, in its view, the statute is broad enough to permit the absolute suppression of an extremely vital kind of speech—
editorializing, *Mayflower Broadcasting Corp.*, 8
179 F.C.C. 333 (1940).[84] Moreover, the theory of the cases is that a vague statute in this field is inherently defective because it inhibits speech, thus presumptively defeating any stated purpose to expand speech. See also arguments at pages 5-13, *supra*.

The fact that the Commission continues to struggle clumsily, inconsistently and often arbitrarily with its own implementation of the fairness doctrine is indication enough that the enabling statute is not clear enough to provide a framework within which details can be confidently worked out. The Commission is doing more than applying standards already provided by Congress contrary to the Supreme

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[84] The uncontrolled discretion of the Commission is exemplified by its changing positions on licensee editorializing. After nine years of prohibiting editorializing as being contrary to the public interest, the Commission decided to permit it so long as it comported with fairness doctrine requirements. FCC Editorializing Report, 25 R.R. 1901 (1949). Since then the Commission has sought to *encourage* editorializing. See e.g. FCC Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry, 20 R.R. 1901, 1913, (1960); *Hearings on Broadcast Editorializing Practices before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 88th Cong., 1st Sess. 87 (1963) (testimony of FCC chairman E. William Henry); Speech by FCC chairman Newton N. Minow before the National Association of Broadcasters Public Affairs/Editorializing Conference, March 1, 1962, published in Minowa and Laurent, Equal Time 148 (1964). Chairman Henry, apparently not wishing to promote just every kind of editorializing, qualified his endorsement by stating to the subcommittee on Broadcast Editorializing Practices: "We have cautioned, however, that the licensee should not do so [editorialize] if he is not prepared to act fairly and to employ an adequate staff as the foundation for meaningful and intelligent editorialization." *Hearings, supra*. In the future the Commission may wish to judge licensee performance in part on whether the licensee's editorials have been "meaningful and intelligent," ignoring as it has done thus far, the First Amendment implications of its statements and decisions concerning program content. Moreover, the Commission's view would permit it to ban station editorials any time it decides such action is once again in the "public interest."

Court command that "sensitive tools" forged by Congress must be used when administrators tinker with First Amendment rights.

180 The Commission's Proposed Rule and Fairness Doctrine Are Similarly Vague, and, Together With the Threat of Sanctions and the Lack of Effective Judicial Review, Produce an Unconstitutional Prior Restraint on the Licensee's Speech

For the reasons stated above, the purported statutory authorization for the Commission's fairness doctrine is defective and cannot be remedied by the Commission. However, even if the Commission, as the delegate of Congress, could constitutionally cure the vice of vagueness in the statute, it has failed to do so. The proposed rule, like the fairness doctrine in general, is vague and possesses all the actual or threatened evils discussed above.

Accepting *arguendo* the Commission's position that the fairness doctrine has been enacted into Section 315(a) (but see subpart B, *infra*), that section speaks of an obligation to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance." The Commission standard is somewhat different in that it states the requirement as that of "affording reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance."[85] Thus the Commission reads-in a qualification that the issues covered by the fairness doctrine are those which are "controversial."

What is one man's "controversy" is another man's dogma; what is "reasonable" opportunity to one person is too little and too late (or, too much and requiring re-

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[85] FCC "Fairness Primer," 29 Fed. Reg. 10416, 2 R.R. 2d 1901, 1904 (1964). This also is substantially the language used in the Notice of Proposed Rule Making, p. 1.

sponse) to another; what is a "conflicting" or "contrasting" view to one person is substantially the same ideology to another; and what is an "issue of public importance" to one person justifies invocation of a right of privacy in the eyes of another. Thus, of the myriad ideas which are discussed on any given broadcasting station, 181 the licensee will conclude that many clearly fall either within or without the meaning of the fairness doctrine, but that many are open to question on this point. Even assuming that it would be otherwise constitutional for the Commission to control speech in broadcasting by clearly defining these ambiguous terms, it is an impossible task.

The proposed rule, Section 73.123, is a prime example of the futility of the Commission's effort. In codifying the "personal attack" principle it adds more ambiguous words: an opportunity for personal reply must be afforded when an attack is made "during the presentation of views" on that person's "honesty, character, integrity, or like personal qualities." § 73.123(a). It is obvious that there are problems involved in defining what is an "attack" and what is "personal," as well as what constitutes a "presentation of views" (see page 47 *supra*), to say nothing of the vagueness of the terms "honesty, character, integrity or like personal qualities." It is impossible to predict all the situations in which problems of interpretation could arise. And what constitutes an attack upon an "identified . . . group"? Is an attack on "the City Council gang" an attack on each city councilman or on the Council as a group? To whom should time to respond be offered when an attack is made on "the Irish Mafia"? In Section 73.123(b), who are included in the phrase "persons associated with the candidates in the campaign"—a candidate's wife and children? even if the attack is somewhat personal? largely personal?

The Commission recognizes in a variety of language in the Notice that there will be problems of interpreta-
182 tion,[86] but it minimizes the significance of this by stating (1) that the Commission is available for interpretation "in appropriate cases" (Notice, p. 1 n. 1) and (2) that "it is not our intent to use the proposed rule as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle" (Notice, p. 2).

The first point only emphasizes the vagueness of the standards involved and encourages the broadcaster to avoid governmental "red-tape" and expense on close questions by simply avoiding, if possible, the situations which give rise to those questions, or by following uncritically the informal advice of the Commission staff. This also emphasizes the wide range of control over program content left to *ad hoc* agency determination, thereby placing the Commission in the role of censor and effectively giving it the final word on what views are to be expressed, how they are to be expressed and by whom they are to be expressed. The danger of this governmental power is heightened by the practical necessity of the broadcaster to act upon FCC *staff* advice.

The second point (assuming, as we need not, the *Commission's* good faith)[87] actually increases the ambiguity in

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[86] *E.g.*, "We have used the phrase 'reasonable opportunity' here and in the proposed personal attack rule because such opportunity may vary with the circumstances; in many instances, comparable [?] opportunity in time and scheduling is clearly appropriate. But in some, where the endorsement involved may be one of many and involve just a few seconds time, reasonable opportunity may call for more than a few seconds if there is to be a meaningful response." Notice, p. 4.

[87] "[E]xperience teaches us that prosecutors too are human." *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961). "Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964).

the applicability of sanctions under the fairness doctrine. Not only must the licensee determine the meaning of such terms as "controversial" and "issues of public importance," but it must also guess at the manner in which the Commission will enforce them as a matter of "good
183 faith."[88] The "good faith" test is also inconsistent with the first point above, which as a practical matter compels licensee adherence to informal staff advice even if the licensee in "good faith" disagrees.

Such a regime of regulation violates due process of law and the First Amendment. *Baggett* v. *Bullitt*, 377 U.S. 360 (1964). Even when acting in "good faith," the licensee is compelled to make a usually impossible distinction between when he is absolutely sure that there has been no personal attack and when he "recognizes that there may be some dispute concerning this conclusion"; in the latter case the licensee "should" take steps to preserve a record of the broadcast in question "for a reasonable period of time" (Notice, p. 2 n. 2). These vague requirements will further discourage the station from broadcasting "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

The Commission's record of past inconsistent and arbitrary rulings (see pages 45-48, 49 n. 84, *supra*) leads to greater licensee inhibitions on still unsettled questions, especially where unpopular causes may be seeking exposure.

Assuming *arguendo* that judicial review could be effective in curbing Commission abuses in this area (but see pages 48-49, *supra*), the licensee's "stake" in any one

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[88] The Commission states that it will act against a licensee only where "there could be no reasonable doubt under the facts that a personal attack had taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist" (Notice, p. 2). Quaere as to *whose* reasonable doubt. Quaere also as to whether a statement correctly reciting a person's conviction for embezzlement or for violation of the Smith Act would raise at least a "reasonable doubt" as to the applicability of the fairness doctrine.

statement, program, or issue probably would be "insufficient to warrant a protracted and onerous course of litigation."[89] In many situations, such as elections, the delay required for formal Commission consideration and court review would effectively moot the problem. See (1) *Republican National Committee*, 3 R.R. 2d 647, *petition for review denied sub nom. Goldwater* v. *FCC*, U.S. App. D.C. No. 18936 (Oct. 27, 1964), *cert. denied*, 379 U.S. 893 (1964) (Goldberg and Black, JJ., dissenting); *Republican National Committee*, 3 R.R. 2d 767 (1964) ("equal opportunities" provision and "fairness doctrine" in-
184 voked; final Commission decision one day before election day); (2) *Daly* v. *Columbia Broadcasting System, Inc.*, 309 F. 2d 83 (7th Cir. 1962) ("equal opportunities" ordered by Commission five days before election day; petition for reconsideration denied four months later); (3) *Columbia Broadcasting System*, 14 R.R. 720 (1956) (Commission refused to hold that "equal opportunities" provision was not applicable until one day before the election).

The lack of clear standards, the potential and actual arbitrariness of the Commission, and the general absence of judicial review, impose upon the broadcast licensee a burden of "self-censorship" condemned by the Supreme Court. See *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 279; *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). The self-censorship resorted to in order to provide programming in conformity with the Commission's known views (or to eliminate programming which raises a question not immediately answerable by the Commission) is enforced by the threat of fines under the forfeiture provision of the Act;[90] and of license revocation[91] or denial of re-

[89] *Freedman* v. *Maryland*, 380 U.S. 51, 59 (1965).

[90] 47 U.S.C. § 502.

[91] 47 U.S.C. § 312(a).

newal;[92] as well as by the threat of such a classic prior restraint as a cease and desist order.[93] The Commission states in its Notice of Proposed Rule Making that one of its purposes is "to assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed" (Notice, p. 2), a clear reference to above-mentioned sanctions. The proposed rule would add the raised fist to the lifted eyebrow in the arsenal of weapons used by the Commission to regulate speech on the airwaves through the fairness doctrine.

This scheme of regulation, combining as it does uncontrolled Commission discretion and Commission
185 threats of possibly catastrophic economic loss, is a "prior administrative restraint" far more direct and coercive than that struck down in the *Bantam Books* case, where the threatening agency did not itself control the sanctions. Any such prior restraint on speech bears "a heavy presumption against its constitutional validity."[94]

B. Lack of Explicit Delegation

In addition to the constitutional requirement for narrowness and precision in a statute bearing on First Amendment freedoms, there is an established line of Supreme Court decisions holding that there must be "explicit" authorization for agency action "within the area of questionable constitutionality . . . ." *Greene* v. *McElroy*, 360 U.S. 474, 506 (1959); *Kent* v. *Dulles*, 357 U.S. 116 (1958); *Hannegan* v. *Esquire*, 327 U.S. 146 (1946); *Ex parte Endo*, 323 U.S. 283 (1944). The congressional authorization will not be inferred from general language or congressional acquiescence. The asserted statutory authorization for the

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[92] 47 U.S.C. § 307(d).

[93] 47 U.S.C. § 312(b).

[94] *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963).

proposed rules is clearly lacking in the required explicitness.[95]

In *Greene* v. *McElroy, supra*, the Supreme Court held that the Defense Department lacked authorization to impose loyalty-security procedures which denied affected persons the right of confrontation and cross-examination. The Department argued that the President had "in general terms" authorized its procedures; that congressional authorization could be "inferred" from general legis-
186 lation concerning the armed services; and that both Congress and the President had acquiesced in the Department's loyalty-security program (360 U.S. 495, 506). The Court, however, rejected the Department's contention (*id.* at 506-07):

> "If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. In many circumstances, where the Government's freedom to act is clear, and the Congress or the President has provided general standards of action and has acquiesced in administrative interpretation, delegation may be inferred. * * * But this case does not present that situation. We deal here with substantial restraint on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures. Before we

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[95] We recognize that the "public interest, convenience and necessity" language of the Act is sufficiently explicit to authorize the Commission to conduct its normal regulatory functions, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940), and that the Congress was not required to provide "an itemized catalogue of the specific manifestations of the general problems," *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 220 (1943). But when, as here, Commission action enters an "area of questionable constitutionality," only "the most explicit" authorization will suffice. *Greene* v. *McElroy, supra*, 360 U.S. at 506, 508.

> are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, within their respective constitutional powers, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. * * * Such decisions cannot be assumed by acquiescence or nonaction. * * * They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them."

In *Kent* v. *Dulles, supra,* as in *Greene,* the Court struck down agency action of doubtful constitutionality due
187 to the absence of explicit legislative authorization. The issue in *Kent* was the Secretary of State's authority to deny passports to applicants who refused to answer questions concerning alleged Communist beliefs and associations. A 1926 statute authorized the Secretary to "grant and issue passports" and "a large body of precedents grew up which repeat over and again that the issuance of passports is 'a discretionary act' on the part of the Secretary of State." 357 U.S. at 123-24. Nonetheless, the Court stated (*id.* at 129-30):

> "Since we start with an exercise by an American Citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or

withhold it. * * * Its [a passport's] crucial function today is control over exit. And, as we have seen, the right of exit is a personal right included within the word 'liberty' as used in the Fifth Amendment. If that 'liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress. * * * and if that power is delegated, the standards must be adequate to pass scrutiny by the accepted tests. * * * Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. * * * We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen.

* * *

"To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs and associations. Congress has made no such provision in explicit terms; and absent one, the Sec-
188 retary may not employ that standard to restrict the citizens' right of free movement."

Hannegan v. *Esquire, supra,* involved First Amendment questions posed by the Postmaster General's denial of a second-class mailing permit to *Esquire* magazine on the ground that it contained material deemed vulgar and risque. He purported to act under a statute which restricted the second-class "privilege" to publications "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry" (327 U.S. at 148-49). The Court

held, however, that this statute did not authorize the Postmaster General's action. It stated, in language pertinent to the instant case (*id.* at 155-56):

> "We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. * * * And the Court held in Ex parte Jackson, 96 U.S. 727, that Congress could constitutionally make it a crime to send fraudulent or obscene materials through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in United States ex rel. Milwaukee Social Democrat Publishing Co. v. Burleson, 255 U.S. 407, 421-423, 430-432, 437, 438. Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the Fourth condition [of the statute] would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country."

In short, the Commission, no less than the courts, "must assume, when asked to find implied powers in a grant
189 of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Ex parte Endo, supra,* 323 U.S. at 300. And Congressional acquiescence in Commission decisions in the area of "fairness" cannot be deemed a substitute for explicit statutory authorization.

The Commission has historically based its fairness doctrine on the "public interest" criterion which governs its

licensing functions under the Act, contending, in substance, that licensees which do not fairly present both sides of controversial public issues do not operate in, or serve, the "public interest." See FCC "Fairness Primer," and appendices thereto, 29 Fed. Reg. 10416, 25 R.R. 1901 (1964). Since 1959, the Commission has also relied upon language added in that year to Section 315(a) as follows:

> "Nothing in the foregoing sentence [exempting bona fide news programs from the 'equal opportunities' requirement of the section] shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

The proposed rules here are said to be authorized by Section 315, along with those sections (§§ 4(i), 303(r)) authorizing the Commission to adopt rules and regulations "not inconsistent with law" in the performance of its functions under the Act.

The quoted amendment to Section 315, however, does not purport to impose a new "obligation" upon licensees or to delegate new authority to the Commission. Rather, it is phrased in terms of preserving a pre-existing "obligation" against implied repeal by reason of enactment of the "news program" exception to the "equal opportunities"
190 requirement. The Statement of the House Managers in the Conference Report concerning the amendment indicates that the quoted language was intended as a "restatement of the basic policy of the 'standard of fairness' which is imposed on broadcasters under the Communica-

tions Act of 1934." H.Rept. No. 1069, 86th Cong., 1st Sess. 5 (1959). See also S. Rept. No. 562, 86th Cong., 1st Sess. 9, 13 (1959). Since the Commission has repeatedly premised its fairness doctrine on the "public interest" criterion of the 1934 Act, and the 1959 amendment by its terms is simply a reaffirmation of an "obligation" presumed to exist under that Act, it is pertinent to consider whether the pre-1959 statutory scheme in fact contains authorization for the fairness doctrine.

Extended discussion is unnecessary, we submit, to conclude that it does not. Under the cited Supreme Court decisions, statutory language authorizing the Commission to grant broadcast licenses upon a finding that the "public interest, convenience, and necessity" will be served falls far short of an "explicit" authorization to direct licensees to adhere to detailed "fairness" requirements in their programs relating to controversial public issues. This conclusion is reinforced by the existence of Section 326, which prohibits censorship by the Commission or interference with "the right of free speech by means of radio communication." And the very specific and narrow language of Section 315, affording "equal opportunities" to "legally qualified candidates," plainly did not authorize the Commission to extend that right to other classes of persons via the fairness doctrine.

Indeed, the legislative history of Section 315 lends credence to the view that Congress, at the time of both the 1927 and 1934 Acts, considered and rejected a "fairness doctrine." Section 315 was taken *in haec verba* from Section 18 of the Radio Act of 1927. The bill reported by the Senate Committee at the time of the 1927 Act contained a provision stating:

191 "If any licensee shall permit a broadcasting station to be used . . . [to broadcast any matter for a valu-

able consideration], or by a candidate or candidates for public office, *or for the discussion of any question affecting the public,* he shall make no discrimination as to the use of such broadcasting station, and with respect to said matters the licensee shall be deemed a common carrier in interstate commerce: Provided, that such licensee shall have no power to censor the material broadcast." (Emphasis added.)[96]

This provision was stricken on the floor of the
192 Senate,[97] and a substitute provision affording "equal opportunities" to "candidates" alone was adopted

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[96] See S. Rept. No. 772, 69th Cong., 1st Sess. 4 (1926); 67 Cong. Rec. 12503 (1926).

[97] At the time the amendment changing this section was proffered on the floor of the Senate, the following colloquy occurred between Senator Dill, principal author of the Senate bill, and Senator Willis:

"Mr. Dill . . .
After we got it out [of Committee] we realized that the 'common carrier' phrase was an unwise phrase to say the least . . .

* * *

"Mr. Willis. I think that remedies one serious objection I had in mind, as to line 12, particularly, which is proposed to be stricken out, where it says 'or for the discussion of any question affecting the public.'
"Mr. Dill. That is a rather broad statement.
"Mr. Willis. Yes." (67 Cong. Rec. 12358).

Senator Howell disagreed with the amendment and stated that:

"It [the provision respecting candidates] is important, but it has not anything like the importance of the provision he has stricken out—the discussion of public questions."

Senator Dill responded:

"That is such a general term that there is probably no question of any interest whatsoever that could be discussed but that the other side of it could demand time . . . I sympathize with the Senator's position; but the opposition to that was so strong in the minds of many that it seemed to me wise not to put it in the bill at this time . . ." (67 Cong. Rec. 12504).

by the Senate and, after slight modification in conference,[98] enacted as Section 18.

Several years later, the 72nd Congress adopted a bill (H.R. 7716) which would have amended Section 18 to extend the "equal opportunities" requirement to situations where a broadcasting station was used "in support of or in opposition to any candidate for public office, *or in the presentation of views on a public question to be voted upon at any election, or by a government agency . . .*" (emphasis added). The report of the House conferees stated: "This amendment broadens Section 18 . . . designed to insure equality of treatment to candidates for public office, those speaking in support of or in opposition to any candidate for public office or in the presentation of views on public questions." H. Rept. No. 2106, 72d Cong., 2d Sess. 6 (1933). The bill, however, was pocket vetoed by President Hoover.

In the following Congress, which enacted the 1934 Act, the Senate Committee reported a bill containing a proposed Section 315 identical to the proposed amendment to Section 18 included in H.R. 7716, discussed above. The report of the committee stated that the proposed section "extends the requirement of equality of treatment of political candidates to supporters and opponents of political candidates, *and public questions before the people for a vote.*" S. Rept. No. 781, 73d Cong., 2d Sess. 8 (1934). (Emphasis added.) Although this bill was adopted by the Senate,

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[98] Even though the language was stricken in the final Senate bill, the Senate conferees apparently urged the adoption of a section containing the "questions affecting the public" language at the Senate-House conference on the 1927 Act. The Senate debates on the bill reported out of conference contain the following:

> "Mr. Howell: Yes, the Senate Conferees . . . are still in favor of these provisions; but I am informed that at least two of the House conferees insist that if these provisions are reinserted the bill will be kil[illegible] (67 Cong. Rec. 4152).

the House refused in conference to accede to the
193 Senate provision, and Section 315 was enacted in language identical to Section 18 of the 1927 Act. See H. Rept. No. 1918, 73d Cong., 2d Sess. (1934).

Thus, Congress in 1959 was plainly mistaken in its view that the Commission's fairness doctrine was authorized under the 1934 legislation. In light of the negative character of the language in the 1959 amendment, it is evident that this language does not have operative effect and is no more than a misguided attempt to protect against implied repeal an "obligation" erroneously presumed to exist under legislation enacted by another Congress 25 years previously. See *United States* v. *Price,* 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); *United States* v. *United Mine Workers of America,* 330 U.S. 258, 281-82 (1947).

Even assuming, *arguendo,* that the 1959 amendment is to be given operative effect, it does not follow that the proposed rules in question are authorized with the explicitness required by the Supreme Court decisions discussed above. The 1959 language relating to "fairness" is very general in form, in marked contrast to the specific language of the Section's provisions concerning "equal opportunities." At most, there is a broad direction or policy pronouncement that licensees should "afford reasonable opportunities for the discussion of conflicting views on issues of public importance"; and perhaps the Commission is thereby authorized to consider a licensee's overall "fairness" in the presentation of public issues in determining whether its operations have been in the public interest.

The proposed rules, however, are very specific in application. If a licensee endorses a political candidate, it must within 24 hours offer "a reasonable opportunity for a candidate or a spokesman of the candidate to respond. . . ."

Similar provisions would apply in the case of "personal attacks" on an "identified person or group." The
194 rules would thus extend in only slightly attenuated form the "equal opportunities" obligation that Congress has restricted to "legally qualified candidates" and which, as discussed above, it has declined to extend to other persons (see *Felix* v. *Westinghouse Radio Stations,* 186 F.2d 1, 3-6 (3rd Cir. 1950), *cert. denied,* 341 U.S. 909 (1951)). In the context of a narrowly drawn "equal opportunities" requirement and the Act's prohibition against Commission interference with freedom of speech (§ 326), the general "fairness" language of the 1959 amendment clearly lacks the requisite explicitness to constitute authorization for a Commission directive that persons and groups (other than "legally qualified candidates") must in specified situations be afforded the opportunity to use the licensee's facilities.

195 CONCLUSION

Upon the foregoing premises, the parties to these Comments respectfully urge that this proceeding be terminated without rule making because the Commission's fairness doctrine and Section 315, upon which rule making is predicated, violate the First Amendment or because the fairness doctrine is otherwise unlawful.

Respectfully submitted,

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June 20, 1966

APPENDIX A

Inhibitive Effects of The Section 315 "Equal Opportunities" Provision And the Fairness Doctrine

Broadcasters are consistently and directly inhibited from producing public service programming by the "equal opportunities" provision of Section 315.

As CBS president Frank Stanton has stated:

> "• • • Whatever the objectives of fairness and equality in which section 315 was doubtless originally rooted, 30 years of experience have established that the section represents an idea which once may have seemed to be good, gone completely wrong.
>
> "The inescapable conclusion is that section 315 does far more harm than good, and that its result is neither to increase diversity of opinion nor expand free speech, but rather as a matter of practical necessity is a compelled suppression and blackout.
>
> "This compulsion is as simple as it is obvious: Time and time again radio and television have been unable to present candidates to the American people because broadcasters have known that under section 315 a half hour to a Democratic or Republican candidate can mean a total of 4, 8, or 16 half hours to obscure and unknown opponents. So when a half hour has had to be multiplied to 8 hours, we have had to forego the half hour. The result has been less, not more, broadcasting in the public interest."[1]

Dr. Stanton has also explained why Section 315 does not work to the benefit of significant third-party candidates:

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[1] *Hearings on Political Broadcasters-Equal Time Before a House Subcommittee on Interstate and Foreign Commerce*, 86th Cong., 1st Sess. 123 (1959).

197 "As a practical matter, the Norman Thomases do not get an opportunity in the campaign unless the stations give time to the Democratic and Republican candidates. I am now speaking under 315.

"If we moved from the restrictions of section 315, I am persuaded that responsible broadcasters would give time, or give an opportunity for the significant third-party spokesman to inject their discussion of the issues at least as they see them in the campaign.

"In the 1960 campaign for President and Vice President, when we had the temporary suspension, all three of the network groups gave time to the third-party candidates, or to the third parties. Even Norman Thomas was invited on to one of those programs, though he was not a candidate in 1960, but because he represented a point of view which the network organization felt should be given some airing.

"We could not have done that if section 315 had been in effect because to open it up to a handful of minority parties, as we did in the 1960 campaign—and when I say 'we' I mean that all 3 of the networks did it—we would have opened ourselves up to possibly as many as 14 other demands for equal time.

"So that prior to 1960, what happened was that the broadcaster did not offer any time and did not live up to the full opportunity that he had within his capabilities simply because he knew that he would be inundated by requests from insignificant splinter parties and groups."[2]

The present Section 315 requires, except for the narrow "news" exceptions, that any free or purchased broadcast

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[2] *Hearings on Political Broadcasts Before the Senate Committee on Commerce*, 87th Cong., 2d Sess. 38-39 (1962).

time for candidates be made available on an equal basis for all candidates in that race. Parties to these Com-
198 ments have been inhibited by this requirement from providing *any* air time in election situations in which to do so would have tied-up their facilities with "fringe" candidates beyond a point which they believed to be in the public interest.

One party states the following:

"Two specific examples of situations which caused us to restrict our political programming occurred within the recent past:

"In the 1965 fall primary elections for the [City] Council, 65 candidates were entered on the ballot. Great public interest centered around only a few of these candidates and, had the limiting provisions of Section 315 not been in effect, we would have presented at least two types of programs to satisfy the interests of our listeners and viewers. One of the types would have been a documentary program examining the personalities of the leading contenders as well as the issues involved. In another program type, we would have presented the leading candidates answering questions put to them by staff newsmen. Obviously, any such service to the public was made impracticable because of the necessity for providing equal opportunities for the appearance of the remaining candidates of the total of 65 involved.

"For the same reasons we avoided special programs relating to the election of 6 persons as members of the Board of Trustees for [a local college] from a field of 54 candidates."

Another party writes:

"We have encountered definite restrictions where we have been inclined to offer free time to political can-

didates. The reason being that the principal candidates would be the logical users of valuable prime free time, but the also-rans and the so-called lunatic fringe preclude such offerings. In this state, the two principal
199 candidates receive more than 95% of the votes and the miscellaneous others split up a mere nothing."

This party explained:

> "[We] offered the two then candidates for the office of U.S. Senate . . . free prime time for debate. This offer was made a day or two before the end of the filing dates, and when these two principal candidates were the only candidates. They accepted the offer, the debate was scheduled, and announced publicly.
>
> "At the last minute, before the deadline for filing, [another person] filed his candidacy which only required 350 names on a petition, and then proceeded to demand equal time. We gave [him] thirty minutes of prime time. It was a most pitiful, disgraceful performance. * * * As a result of this experience, we will no longer offer free time for political candidates where we are likely to get involved with miscellaneous, also-rans, and lunatic fringe candidates demanding equal time. Clearly this removes from the sincere and proper candidates the opportunity to use free and prime time on our stations . . . and just as clearly it indirectly means that the unknown minority and fringe candidates are exercising a veto and keeping the principal candidates off the air under free time conditions."

Still another party to these Comments gave this example of "self-censorship" coerced by Section 315:

> "In the 1964 . . . General Election, there were 17 candidates for County Sheriff. None of the candidates was a familiar political figure and [the station] wanted very much to present four or five of the candidates to its au-

dience so that they might become acquainted with the important (we felt) candidates. The remaining 12 or 13 candidates were largely ex-policemen, perpetual office-seekers, and people with histories of brushes with law enforcement. An hour of public service time could have been devoted to the leading candidates which would have informed the public and helped the candidates. A program on which all 17 appeared would have given each candidate something under 4 minutes and would have served only to confuse the electorate even further. Obviously, such a program was not produced."

One party observes that the Section 315 effect of suppressing regular reports from incumbents seeking re-election deprives the public of information in which it would have had an interest.

The inhibiting effects of the fairness doctrine are admittedly more subtle, especially because the Commission in effect compels the broadcasting by a licensee of at least some controversial public issue programs "in the public interest." A number of the parties to these Comments have expressed the view that they approach possible programs involving controversial issues and open debate with great caution because of the complexities and burdens of the fairness doctrine. One party noted that it finally decided as a matter of safety on one issue to give time to the KU Klux Klan and similar organizations. This party concluded that "to some extent the time devoted to the 'lunatic fringe' is at the sacrifice of the time devoted to understanding the real issues." Several parties indicated that they would give more time to programs involving controversial issues if it were not for the "nut" factions that claim time under the fairness doctrine.

Even viewpoints which the licensee would concede to be "significant" can be so varied on any particular issue that

the station is inhibited from undertaking a review of them. Some of the experiences of the parties follows:

1. "A typical example would be a program involving the race problem in which inordinate numbers of splinter groups claim to represent significant and slightly different points of view. A panel discussion would be impossible because of the large number of groups to be represented, and a documentary program would lose
201 effectiveness and be unsuited for broadcast if it were handicapped by the need to cover all points of view.

"Another instance might concern a broadcast covering the pros and cons of flouridation of the municipal water supply to prevent tooth decay. Suppose we arrange a broadcast debate between qualified medical or dental authorities arguing the benefits and dangers of adding flouride to the water supply. Following the debate, a group representing civil liberties accuses us of not touching on the legal aspects of flouridation, where upon another debate is arranged. Following this, a taxpayers' group asks for time to expose another side of the problem, the cost of initial equipment and continuing costs of chemicals used in the flouridating process. This calls for another debate, or at least the representation of this viewpoint, and then its opposing viewpoint, perhaps by a city authority. And on and on. The point is, we would not feel free to do what a newspaper does when it covers only one aspect of a problem—in this case, whether flouridation is beneficial or harmful to health."

2. "[We] investigated the possibility of presenting a program on the right of the United States to pursue its present course in the war in Vietnam. It was our original intent to present only the 'hawk,' 'dove,' and administration viewpoints. However, our investigation led to the belief that there were so many other views

of the situation, e.g., 'pacifist,' that we could not present all of them and hence, decided not to schedule the program."

3. "There are several conflicting viewpoints on the Jr. College situation. That segment of our population that are old enough to have seen their children through college only want to protect their tax base. They are against any expense of education, and especially 'squandering money on needless Jr. Colleges.' There is a definite group who favor a broad based Jr. College
202 program (such as California has established) which would create a sizable number of Jr. Colleges in the state to augment the few now in existence. This would require the selection of locations (bickering between cities), increased taxes, the transfer of some students et cetera. There is another group that doesn't believe in the Jr. College system because of intellectual reasons, and who favor more the trade school or vocational school techniques.

"The several private colleges in this state which depend upon substantial enrollment fees understandably are not enthusiastic about an expanded Jr. College system.

"I trust we have already gotten sufficient detail to show you varying viewpoints. We would like very much to editorialize on behalf of the forgotten student from the high schools of this state who deserve an opportunity for higher education, whose parents have been paying state taxes low these many years. If we were to devote editorial time to this subject, we would be submerged by requests from all kinds of sizable groups who have conflicting viewpoints. We do not wish to get involved in this kind of squabbling and cluttering up of our broadcast schedules, and to add to the public confusion of the issue."

Various parties also express reluctance to program one side of an argument in such circumstances as when the "other" side refuses to appear, or when such programming would likely invite requests for time on a number of issues (e.g. The John Birch Report).

Various parties to these Comments find that fairness doctrine restrictions on editorialization produce results such as fewer editorials, inhibitions regarding the endorsement of political candidates, and inability of radio and television to balance one-sided newspaper opinion in the community by presenting more of another side (the latter point being true of all controversial public issue programming).

203 The many-sided-issue complaint of broadcasters is heard also with respect to editorials:

> "The problem of a supplemental water supply for our area presents a many sided controversy in that there are several potential sources of water, a myriad of ways in which the water can be delivered and an unending array of potential tax sources for payment of water. Were we to endorse a single course of action in any of these three matters and take an editorial position, the requests for air time to air differing viewpoints would be overwhelming. There are other issues similarly complex, but the one above is the best current example."

Similarly, a number of the parties find that the personal attack doctrine as enunciated even prior to rule-making is burdensome administratively, and that it tends to inhibit the station from controversial issue programs in general, and discourages live, discussion programs in particular. Said one party: "This requirement, in our opinion, effectively discourages the use of the live, informal discussion programs." Said another: "This requirement would make me extremely hesitant to do a documentary on an undesirable political situation."

Any controversial public issue for which there is a definite point of decision raises another problem. Whether it be an election of officials, a referendum, or the vote of a legislature (or the veto of a chief executive), the broadcaster is obligated to provide time for all sides of the controversy before that point of decision. In many cases, the complexities involved in ascertaining significant viewpoints, and deciding upon the appropriate format and amount of time for reply, are so great, and the time remaining is so short, as to discourage the licensee from presenting any discussion of the issue. In some cases, of course, a licensee is forced to make a decision on a complex situation, often without Commission guidance and in a short
204 space of time. How many individual stations could have been expected to react as the networks did in the three following cases?

1. On February 11, 1959, Lar ("America First") Daly, requested equal time on WBBM to campaign for the office of Chicago mayor; CBS refused his request. On February 19, the FCC directed CBS to provide equal time to Daly. On February 20, CBS refused to comply and filed with the Commission a petition for reconsideration. The election was held on February 24. How many individual stations, with an FCC decision pending against them, would have stood by their determination on the equal-time question pending a decision on a petition for reconsideration? (The Commission reaffirmed its decision of February 19 on June 17, 1959.) See *Daly* v. *Columbia Broadcasting System, Inc.*, 309 F.2d 83 (7th Cir. 1962).

2. On November 1, 1956, five days before election day, Adlai Stevenson and the Socialist Party candidate for president by telegram requested equal time on the three major broadcast networks to respond to an address on the Suez crises delivered to the nation by President Eisenhower on October 31. On the same day, the three networks by

telegram requested the advice of the FCC to the effect that no such equal time was required. On the same day, the FCC by telegram advised the three networks:

> "For the FCC to conclude that Section 315 does not apply in the circumstances you have outlined is dependent on such an involved and complicated legal interpretation that we are unable to give you such a declaratory ruling at this time." 14 R.R. at 720.[8]

On November 5, the Commission informed the networks by telegram that equal time is not required when the President reports to the nation on an international crises. The election was held on November 6. How many individual stations would have waited until the day before the election before making a final decision on whether to give Governor Stevenson and the Socialist Party candidate equal time? See *Columbia Broadcasting System, Inc.*, 14 R.R. 720 (1956).

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3. Immediately after the Supreme Court, on October 28, 1964, denied a writ of certiorari to review a denial of equal time to Senator Goldwater, the Republican National Committee requested time under the fairness doctrine. On October 29, the Republican National Committee complained to the Commission that the networks had rejected its request. On November 2, the Commission released its decision that the networks had acted within their discretion in refusing time to Senator Goldwater. The election was held the next day. How many individual stations, with a complaint pending against them, would have waited until the day before the election before making a final decision on whether to provide time to Senator Goldwater? See *Republican National Committee*, 3 R.R. 2d 647, *petition for review denied sub nom. Goldwater* v. *FCC*, by 3-3 decision

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[8] Commissioner Hyde dissented: "The answer is clear in the language of the statute . . . ." 14 R.R. at 722.

of the U.S. Court of Appeals for the District of Columbia, No. 18935 Oct. 27, 1964, *cert. denied,* 379 U.S. 893 (1964); *Republican National Committee,* 3 R.R. 2d 767 (1964).

Parties to these Comments have experienced similar situations which have forced them to act at their peril in denying a request for reply time.

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APPENDIX B

Application of the Fairness Doctrine to Religious Questions

In the "Fairness Primer"[1] the Commission traced the history of the development of the fairness doctrine as a part of the regulatory process. The first cited decision involving the application of the principle of fairness was *Great Lakes Broadcasting Company,* 3 FRC Ann. Rep. 32 (1929), in which a station whose programming was devoted exclusively to the religious beliefs of a single sect had applied for a modification of its license. In denying the application and granting that of a mutually exclusive competitor, the Federal Radio Commission stated that "the station is used for what is essentially a private purpose . . . and, in addition, is constantly subject to the very human temptation not to be fair to opposing schools of thought and their representatives."[2] In 1938, the Commission denied the application of a group who proposed to use a station "primarily for the dissemination of religious programs to advance the fundamentalist interpretation of the Bible" and who had stated that "in connection with religious broadcasts, the station's facilities would be extended only to those whose tenets and beliefs in the interpretation

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[1] 29 Fed. Reg. 10416, 2 R.R. 2d 1901 (1964).

[2] Quoted in *Young Peoples Association for the Propagation of the Gospel,* 6 F.C.C. 178, 181 (1938).

of the Bible coincide with those of the applicant.'"[3] It is thus apparent that during the early days of radio regulation, the Commission and its predecessor established that an important factor in a licensee's legal obligation to serve the public interest was the obligation to be "fair" in its programming and that this obligation was applicable to religious questions.

207 In 1946, the Commission received the complaint of an atheist who alleged that three California stations had broadcast direct arguments against atheism as well as numerous church services, Bible readings and prayer meetings, but had refused to make time available to proponents of atheism.[4] The stations replied to the complaint arguing that (1) the carrying of programs on atheism would not be in the public interest and (2) the question of the existence of a deity was not a controversial issue of public importance in their service areas.

The Commission dismissed the petition, apparently because it felt many stations had indulged in similar practices and the selection of these three particular stations for punishment would be arbitrary. The opinion discussed freedom of speech and indicated the Commission's position that under the First Amendment a licensee could not bar protected speech from access to the airways. Using as examples the minority position of the early Christians and the attacks by established churches on some of the ideas of Jefferson, Jackson, and Lincoln, the opinion went on to point out that as long as open discussion of all viewpoints is permitted, sound ideas and institutions become stronger under criticism. Although stating that an individual licensee was permitted a wide discretion in deciding which

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[3] *Young Peoples Association for the Propagation of the Gospel, supra* note 2, at 180.

[4] *Robert Harold Scott*, 11 F.C.C. 372, 3 R.R. 259 (1946).

views and which spokesmen should be presented, the Commission stated that:

> "The fact that a licensee's duty to make time available for the presentation of opposing views on current controversial issues of public importance may not extend to all possible differences of opinion within the ambit of human contemplation cannot serve as the basis for any rigid policy that time shall be denied for the presentation of views which may have a high degree of unpopularity."[5]

208 In the aftermath of the *Scott* decision, the Commission was subjected to a great deal of criticism by broadcasters, the press, the clergy and Congressmen.[6] The decision was widely interpreted to mean that, when religious programming was carried, "equal time" had to be allocated to atheists.[7] While this storm of criticism brewed around the Commission, it did nothing for almost two years, apparently heeding the advice of its Director of Information, who on December 6, 1946, in a memorandum entitled *Scott Decision* v. *Public Relations,* advised the Commission that "to attempt clarification [would] prompt further argument" and would "surely be interpreted as a sign of weakness on the part of the Commission."[8]

Then, on April 27, 1948, the Commission deferred action on the renewal application of WHAM, Rochester, New York, pending the investigation of a complaint by a member of the Rochester Society of Free Thinkers. The complaint concerned a request for time to answer remarks made in a

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[5] 11 F.C.C. at 376, 3 R.R. at 264.

[6] See Smead, *Freedom of Speech by Radio and Television* 61 (1959).

[7] See Commission letter to Congressman Kersten, reprinted in *Hearings Before the House Select Committee to Investigate the Federal Communications Commission Pursuant to H. Res.* 691, 80th Cong., 2d Sess. 200 (1948).

[8] Reprinted in *Hearings, supra* note 7, at 184.

sermon by Father Ignatius Smith of Catholic University. The sermon clearly attacked atheists by warning that:

> "If the godlessness, the irreligion of so many dozens of millions of our people continues to grow, our greatness is doomed and our future is damned.
>
> • • • •
>
> "America cannot be preserved by godlessness.
>
> • • • •
>
> "We are battling against indifferentism, communism, absolutism, and atheism."[9]

209 In a memorandum to the Commission, the staff indicated that the "station's position [was] squarely in conflict with the Commission's decision in the *Scott* case" and recommended a hearing on the renewal application.[10] The Commission deferred action on the renewal application and decided to request more information from the station. Although several staff letters to the station were drafted, the Commission did not finally approve a letter until July 12, 1948. The letter stated that the Commission's fundamental concern was with the question of whether "the Society of Free Thinkers or anyone else [had] been denied time by WHAM because WHAM disagrees with their point of view."[11] The draft letters prepared by the staff included questions concerning the "importance of balanced programming" and the Commission policy of making radio available to views falling within the protection of the First Amendment.[12] However, on June 19, 1948, the House of Representatives had passed House Resolution 691[13] appoint-

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[9] *Id.* at 141.

[10] *Id.* at 181.

[11] *Id.* at 183.

[12] *Id.* at 182.

[13] See *Final Report of the Select Committee to Investigate the Federal Communications Commission*, H. Rept. No. 2479, 80th Cong., 2d Sess. (1949).

ing a special committee to investigate the Commission, and, apparently remembering the previous storm of protest, the Commission sent the innocuous letter described above. In answer, WHAM submitted a very short letter, which in substance stated *no* time had been denied anyone because the licensee disagreed with their viewpoints.[14] Subsequently, on August 18, the license of WHAM was renewed without opinion.[15] At the Committee hearings on the *Scott* decision, Commission spokesmen tried to ward off congressional criticism by stating that the opinion held only that "a licensee may not, because of disagreement with a particular point of view, preclude the use of his facilities for the presentation of that point of view."[16]

We submit that this construction is a far cry from the commanding language of the *Scott* decision which concluded a discussion of the issues with the statement that "the criterion of the public interest in the field of broadcasting clearly precludes a policy of making radio wholly unavailable as a medium for the expression of any view which falls within the scope of the constitutional guarantee of freedom of speech."[17]

This later construction of the *Scott* decision became official policy when on August 18, 1948, the day the WHAM renewal application was granted, the Commission addressed a letter to Edward J. Heffron, President of the Religious Radio Association, which stated that it had "never stated or indicated that atheists or persons with similar views are entitled to radio time upon request to answer or reply to the various religious broadcasts which may be carried by

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[14] *Hearings, supra* note 7, at 188.

[15] *Id.* at 183.

[16] *Id.* at 188.

[17] *Robert Harold Scott*, 11 F.C.C. 372, 376, 3 R.R. 259, 264 (1946).

a radio station."[18] On two separate occasions since the congressional hearings in 1948, Scott, through petitions to the Commission, has sought to make use of the rights of atheists to express their viewpoints under the fairness doctrine.[19] His requests have been denied both times on the grounds that the religious programs of the stations in question "did not present situations in which the station denied the opportunity for presentation of a controversial issue of public importance" (25 R.R. at 349). Thus, the Commission, without ever having explained its reasons, has come full circle from the position taken in the first *Scott* decision—that sound ideas become stronger under criticism—to the holding that religious programming does not present a controversial subject.

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In the light of these precedents and the apparent turnaround in Commission policy, it is interesting to note the Commission's decisions in two recent cases. In *Lamar Life Broadcasting Co.*, 5 R.R. 2d 205 (1965)[20] short-term license renewal was issued to WLBT, Jackson, Mississippi. The Commission held that the practice of excluding all of the area's Negro churches from a 10-minute daily program, in which other churches participated on a rotating basis, was obviously "inconsistent with the public interest" (*id.* at 220). In *Brandywine-Main Line Radio, Inc.*, 4 R.R. 2d 697 (1965), the Commission granted an assignment of licenses of WXUR, WXUR-FM, Brandywine, Pennsylvania, over the objections of a number of church and community groups that the assignee's president would use the station's facilities to broadcast intemperate attacks on

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[18] 3 R.R. 264-a.

[19] See Commission letters to Scott at 5 R.R. 859 (1949) and 25 R.R. 349 (1963).

[20] Reversed for failure to hold a hearing on the question of whether the station's programming had met the "public interest" standard of the Communications Act. *Office of Communication of the United Church of Christ* v. *FCC*, 7 R.R. 2d 2001 (D.C. Cir. 1966).

people and groups who held religious or political views differing from his own. The Commission, after a discussion of the complaints, including the possibility of religious controversies, relied on the assignee's representations that it would abide by the fairness doctrine in the operation of the station and granted the application. These two cases suggest that the Commission policy concerning the controversial nature of religious programs first enunciated in the 1946 *Scott* decision may still be enforced in some circumstances. However, the Commission's action in *Mrs. Madalyn Murray,* 5 R.R. 2d 263 (1965), indicates that the lesson learned in the congressional hearings on the *Scott* case has not been forgotten. In *Murray,* the Commission was requested, pursuant to the fairness doctrine, to direct 15 Hawaii radio stations to afford broadcast time for
212 the discussion of atheism. In denying the request, the Commission held that no violation of the fairness doctrine had occurred. The concurring opinion of Commissioner Henry makes it clear that the Commission once again relied on the theory that "the carrying of a religious broadcast does not, in and of itself, mean that one side of a 'controversial issue of public importance' was presented."[21]

The *Murray* decision follows from the rationale adopted in the wake of the furor over the first *Scott* case. Atheists and free thinkers consistently have been denied the protections of the fairness doctrine since *Scott,* while Negro churches in Jackson, Mississippi, and Catholic and Jewish groups in Philadelphia have been held to be entitled to fair treatment. The decisions cannot be reconciled, and the only distinguishing fact seems to be that, in the one line of cases, atheists are involved, and, in the other, substantial pressure groups.

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[21] In Commissioner Henry's opinion, controversy would occur in a religious program only where "a bond issue or the nuclear test ban treaty" or some similar issue was mentioned in a sermon. 5 R.R. 2d at 266.

Comments of Bedford Broadcasting Corporation, et al.

Commissioner Loevinger in his dissenting statement in *Murray* recognized the dichotomy between the majority-concurring opinions in *Murray* and the *Brandywine-Main Line* (*WXUR*) case. First, examining the majority holding that the stations had acted in "good faith", he pointed out that the Commission has held in other cases that good faith alone is not enough to satisfy the fairness doctrine. He went on to state that:

> "If good faith were taken as the test of fairness, the most biased and dedicated extremist would be privileged to present the most partisan and one-sided programming, and the most conscientious and self-critical broadcaster would be subject to the greatest duty of balanced presentation. By such a construction the 'fairness doctrine' would penalize those who are most fair and would be self-defeating. The test of applicability must, therefore, remain the Commission's
> 213 judgment as to whether a broadcasting station has acted with 'fairness' in the sense that it has afforded a fair opportunity for the presentation of conflicting viewpoints on a given issue."[22]

He then proceeded to analyze the *Brandywine-Main Line* case in terms of the *Murray* holding and stated that:

> "As recently as March of this year the Commission had before it an applicant who proposed to broadcast unconventional and unpopular religious and political viewpoints. The majority in that case, over my objection, took some pains to state specifically that the broadcasting by a religious group of its own viewpoint exclusively was not in the public interest and did invoke the fairness doctrine which required the opportunity for the presentation of contrasting viewpoints. * * * [*Brandywine-Main Line* (*WXUR*), 4 R.R. 2d

[22] 5 R.R. 2d at 269.

697.] The contrasting opinions in that case and this one suggest that the fairness doctrine applies only when viewpoints acceptable to the Commission are denied the opportunity for presentation. This anomaly simply emphasizes the error of the Commission's whole approach to this subject."[23]

Commissioner Loevinger's suggestion that the Commission invokes the fairness doctrine in an arbitrary fashion is especially pertinent to a discussion of the doctrine because, as a Commission, he participates in the many fairness questions which are decided informally by the Commission or its staff. These decisions are not made public and hence are not available for analysis. The reported decisions on the subject, as Commissioner Loevinger has also pointed out, contain "no public exposition of views or rationale," the Commission being "either unable or unwilling to clarify and specify its own understanding of the 'fairness doctrine'."[24] In this context, the fore-
214 going analysis of the efforts of atheists to obtain "fairness" in the presentation of their viewpoint sheds a great deal of light on the Commission's enforcement of the doctrine in other areas.

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215 **Comments in Opposition to Proposed Rulemaking**

Comes now Griffin-Leake TV, Inc., WBEN, Inc., and KBIF, Inc., through their attorneys, and submit comments in opposition to adoption of the proposed rule in the above-referenced proceeding. In support thereof, the following is shown:

Preliminary Statement

1. On April 8, 1966, the Commission released a Notice of Proposed Rule Making looking toward the adoption of cer-

[23] *Ibid.*

[24] Loevinger, *The Issues in Program Regulation*, 20 Fed. Comm. B.J. 3, 6 (1966).

tain rules dealing with the obligations of broadcast licensees in cases where personal attacks or editorials either supporting or opposing political candidates are broadcast over the licensee's facilities. With the exception of a few albeit significant changes which will be subsequently discussed, the proposed rules would embody and codify the Commission's prior interpretative rulings which have previously constituted part of the so-called "Fairness Doctrine."

216 2. The "personal attack" provisions of the doctrine presently provide that where a personal attack occurs over the licensee's facilities in connection with a controversial issue of public importance, the licensee must send a transcript or an accurate summary thereof to the individual or group attacked, together with an offer of time for an adequate response. In connection with station editorials endorsing or opposing political candidates, the licensee in appropriate circumstances must inform the candidate or candidates of the station's editorial opposing his or their candidacy or supporting the candidacy of a rival and offer a reasonable opportunity for response.

3. The procedure traditionally employed by the Commission where questions have arisen in these areas has consisted of censuring letters to the licensee and the question considered by the Commission at the time of renewal. If there were sufficient instances in which a licensee had failed to live up to his obligations under the doctrine, the Commission could very well determine that a short term renewal was called for or if the case were severe enough, that no renewal at all should be granted. And, of course, the power of revocation has always existed as an additional measure of enforcement.

4. It is submitted that the present policy and procedure followed by the Commission in connection with this aspect of the "Fairness Doctrine" constitutes a more effective, flexible, fair, and realistic approach than that contemplated by the proposed rule.

5. Paragraph (a) of the proposed rule is applicable where a "personal attack" is made upon the "honesty,
217 character, integrity or like personal qualities of an identified person or group . . .". Thus, the rule is objectionable initially on the basis of the very obvious ambiguity as to its applicability. What constitutes a "personal attack"? What are "like personal qualities"? What is an "identified group"? In paragraph 3 of the Notice of Proposed Rule Making, the Commission stated that one of the purposes of codification was to "make more precise the licensee's obligations in this important area." The wording with respect to the applicability of the proposed rule obviously falls far short of any desirable degree of precision. Therefore, since the applicability of the proposed rule is latent with substantial uncertainties, it is subject to challenge on the grounds that it does not sufficiently apprise the licensee of his duty and responsibility thereunder, and for this reason, it is probable that the rule, if challenged, would be struck down as being Constitutionally vague.

6. The only "certain" aspect of the proposed rule is that licensees will be subjected to forfeitures for violation. This will be an additional sanction and not a substitute one because a licensee's performance under the "Fairness Doctrine" will still be subject to review at renewal time. It is apparent, therefore, that the proposed rule would serve only to increase the burdens of the licensee under the "Fairness Doctrine" without removing any of its vagueness. Needless to say, in a situation where responsibilities are so vague but sanctions so certain, licensees will naturally be more reluctant to schedule programs of a controversial nature. The rule in the long run would therefore run precisely contra to that which the Commission
218 has recently sought to foster and encourage. See, Memorandum Opinion renewing license of KTYM, released June 17, 1966.

7. Codification of a doctrine which the Commission has previously conceded "does not apply with the precision of the equal opportunities requirement" is not an appropriate method of coping with the problem of fairness. See, *Fairness Primer*, FCC 64-611, July 1, 1964. The flexibility required in dealing with such broad and intangible concepts as "fairness" would not be available under codification. In the past it has frequently been possible to resolve "fairness" problems by an exchange of correspondence between the Commission and the licensee. Now, however, the proposed time limits will effectively preclude such conciliations. Practically speaking, because of the proposed time limitations for supplying a transcript or summary thereof, a licensee will, of necessity, have to decide whether a personal attack has occurred on his facilities without the benefit of a clarifying ruling by the Commission. The rule in effect therefore closes the Commission's door to what has previously constituted a valuable and effective service to the public and to the broadcast licensee. With codification, the Commission therefore loses a very practical tool of administrative flexibility.

8. As indicated above, one of the most conspicuous deficiencies of the proposed rule is the time limitation imposed upon licensees for compliance (seven days in cases of personal attacks and twenty-four hours in editorials concerning political candidates). These time limitations will require the licensee to make practically on-the-spot
219 judgments in an area where answers turn upon complicated factual situations and intangible legal considerations. The fact that correspondence with the Commission for a prior interpretative ruling will be precluded has already been mentioned. Even more distressing is the fact that such time limitations will additionally serve to preclude consultation by the licensee with Washington counsel on whose opinions licensees have traditionally been compelled to rely for resolution of such vague and intangible legal matters. It is simply not realistic to expect a

licensee whose talents lie in the specialized art of broadcasting to also be qualified as a legal scholar. It is submitted therefore that the time limitations of the proposed rule are impractical and totally unrealistic. As the proposed rule now stands, it would deprive the licensee of fundamental rights under the equally "fair" concepts of "due process."

9. The Commission in paragraph 3 of the Notice of Proposed Rule Making stated that the second purpose of codification is to enable the Commission to take effective action where the specified procedures are not followed. This is tantamount to an admission by the Commission that its policy procedures are ineffective. Such, however, is not the case. Recent years have witnessed an increasing use of censuring letters and short term renewals in cases where violations of the "Fairness Doctrine" have occurred.

10. It has been pointed out that codification would serve to increase the burdens of the licensee and would deprive the Commission of the flexibility it has previously had in resolving questions in this area. However, if the Commission should conclude that codification is desirable, then the present wording of the proposed rule should at the minimum be modified in the following respects in order to remove and clarify some of its present vagueness and uncertainty. For example, in paragraph 4 of the Notice of Proposed Rule Making, the Commission stated that the licensee in this regard will continue to be required only to make "good faith judgments." If "good faith" is to be considered as an element of compliance, then an appropriate phrase to that effect should be incorporated within the rule itself. The Commission further stated that the rules are directed to situations where there could be "no reasonable doubt under the facts that a personal attack had taken place." If such is in fact what is contemplated by the Commission, then the wording of the proposed rule should be amended accordingly. In Footnote 1, the Commission indicated that licensees "can and should

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promptly consult the Commission for interpretation of our rulings and policies." If this form of relief is to be afforded to the licensee, then the proposed rule should be amended to guarantee it. Finally, the proposed rule should be modified to provide a longer and more realistic time limitation within which the licensee will be given to comply. Such a time limitation should be sufficient to permit the licensee to evaluate the matter within the specific factual context and consult both with the Commission and with counsel. Anything short of such "fairness" violates the fundamental elements of "due process."

11. In conclusion, it is submitted that codification in this area is not only inappropriate, but it is completely
221 unrealistic and unnecessary. Determinations and compliance in this area can best be achieved through the Commission's existing procedures.

WHEREFORE THE PREMISES CONSIDERED, Griffin-Leake TV, Inc., WBEN, Inc., and KBIF, Inc., respectfully request that the proposed rule not be adopted and that further action in this proceeding be terminated.

Respectfully submitted,

GRIFFIN-LEAKE TV, INC.
WBEN, INC.
KBIF, INC.

By /s/ FRANK U. FLETCHER
Frank U. Fletcher

By /s/ WADE H. HARGROVE
Wade H. Hargrove

Of Counsel: *Their Attorneys*

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June 20, 1966

224 **Comments of Golden Empire Broadcasting Company**

Golden Empire Broadcasting Company, by its attorneys, respectfully submits herewith its comments in response to the Notice of Proposed Rule Making in the above-captioned proceeding, released on April 8, 1966. Golden Empire Broadcasting Company is the licensee of Stations KHSL and KHSL-TV, Chico, California and Station KVCV, Redding, California.

Golden Empire Broadcasting Company opposes the adoption of the rules proposed in the above-captioned proceeding. The Commission has not demonstrated any need for such rules, and Golden Empire Broadcasting Company believes that not only is there an absence of need, but that the "fairness" area is one in which no specific rules should be set forth.

225 Operation in accordance with the principles of the fairness doctrine involves, as indeed the Commission recognizes, the exercise of a great deal of discretion by the individual licensee. The licensee should not be unduly restricted by a set of specific regulations which do not, as they cannot, provide specific solutions to specific problems but do deprive it of the full use of its discretion in solving such problems.

Golden Empire Broadcasting Company therefore respectfully urges that the above-captioned rule making proceeding be terminated without the adoption of any rules concerning "fairness doctrine" procedures.

Respectfully submitted,

GOLDEN EMPIRE BROADCASTING COMPANY

By HALEY, BADER & POTTS

/s/ ANDREW G. HALEY
Andrew G. Haley

/s/ LOIS P. SIEGEL
Lois P. Siegel

Its Attorneys

June 20, 1966

1735 DeSales Street, N.W.
Washington, D. C. 20036

226 **Comments By Mission Broadcasting Company**

1. The Commission, by a notice of proposed rule making released April 8, 1966 (FCC 66-291) has requested comments with respect to proposed rules codifying policies and procedures heretofore established relating to the so-called "personal attack doctrine" and the matter of political editorials. Mission Broadcasting Company urges the Commission not to adopt the proposed rules. It is of the opinion that the subject matter covered by the notice of proposed rule making requires complete re-evaluation by the Commission.

2. Turning first to the so-called personal attack doctrine, we find no reasoned doctrine but a mass of contradictions. The Commission states that the doctrine is limited to those situations where a personal attack occurs in connection with a controversial issue of public importance. The Commission nowhere explains why such a limitation is necessary or desirable. If, for example, a personal attack is made during a program involving the discussion of

227 a controversial issue of public importance, the person attacked is entitled not only to an opportunity to reply but also to notice of the attack and he must be furnished a script of the program in which the attack occurred. This obligation is absolute—it is unrelated to the truth or falseness of the charge. If, on the other hand, a personal attack is made upon an individual during the course of any other type of program—e.g., by a disc jockey during an entertainment program; by a clergyman during a religious broadcast; by a news announcer or commentator during a news broadcast; etc.—the Commission's policy would not require the attacked person to be notified, he would not be entitled to a script, and apparently he could also be denied an opportunity to reply to the attack. This result would follow from the Commission's doctrine whether or not the charge was correct or false.

3. It is difficult to spell out a rationale for such a policy. The Commission at times states that the policy is based upon licensee responsibility. However, the Commission fails to apply the test. Presumably it is not responsible conduct for a licensee to broadcast or permit the broadcast of a personal attack upon an individual or group if the licensee either knows that the charge is false or is reckless in his failure to try to ascertain whether there is any truth to the charge. If that is the test, why
228 should a false personal attack by a disc jockey or a news commentator be differentiated from a false charge during a panel discussion. Or, if truth or bona fides of the licensee is the test, why apply the rule where the charges made are true? The Commission has never answered these questions.

4. The doctrine as enunciated leaves other questions unanswered. The implication in the Commission's policy is that by complying with the notice and script furnishing procedure the licensee is relieved of any responsibility for broadcasting a personal attack. It is difficult to believe that the Commission is prepared to permit such an abdication of licensee responsibilty by broadcast licensees.

5. The Commission has also stated that the personal attack doctrine is part of the fairness doctrine. Is it Commission philosophy that a well-rounded presentation on a controversial issue is not possible unless the person attacked is given the opportunity of replying? In other areas involving discussion of controversial issues, the Commission leaves it up to the judgment of the licensee to select the spokesman for the differing points of view. Why should the Commission, in the case of a personal attack, lay down a hard and fast rule that the presentation of the opposite point of view in such an attack must be by the person who is attacked? If the Commission believes that fundamental fairness requires that the person attacked be given an op-

portunity to state his point of view, this opportunity
229 should also be extended to a person attacked in an entertainment program or in a news program. The Commission says "no" but furnishes no reasoning for its answer.

6. The anomalies do not end here. The Commission has announced that the doctrine does not extend to personal attacks by political candidates, spokesmen or persons associated with them in a campaign as against other candidates, spokesmen or persons associated with them in a campaign. So far as candidate versus candidate is concerned, the Commission points out that the equal opportunity requirements of Section 315 is the governing consideration. But Section 315 does not apply when the candidate himself is not speaking. If during a political campaign, a personal attack is made by a non-candidate against another non-candidate, the notice and script-furnishing procedure is not applicable. Why not? The Commission offers no explanation. It merely states that it recognizes that it is in need of further experience to delineate more precisely the nature of licensee responsibility in this area. Mission Broadcasting Company believes that the same policy considerations which the Commission has not yet resolved with respect to attacks during political campaigns are also applicable to the entire field of broadcasting. The rigidity inherent in codification of rules should be avoided while the Commission is thrashing about for a reasonable exposition of policy.

230 7. The inconsistency of the Commission's basic position is revealed by its proposed rules on political editorials. If a licensee in an editorial supports or opposes a candidate, he must, within 24 hours, advise the interested person, furnishing him a copy of the editorial and give him opportunity for a reply. Political editorials clearly relate to electioneering but the Commission has indicated that it does not have sufficient experience in the area of electioneer-

ing to come up with a detailed answer. What is there about political editorials that gives the Commission confidence that it has had enough experience to warrant the adoption of detailed rules? A licensee can permit the supporter of a candidate to endorse a candidate, to oppose a candidate, or even to make a personal attack on the opponent. No specific rule comes into play to require notice or the furnishing of a script. However, if the licensee broadcasts a mild editorial supporting or opposing a candidate, the full panoply of notice and script-furnishing comes into existence. Does the Commission believe that there is a greater element of unfairness involved when the station editorializes than when it permits its facilities to be utilized? The Commission has given lip service to encouraging licensees to editorialize. It would appear that what the Commission grants with one hand it takes away with the other. In view of the proposed rule, it is difficult to believe that the Commission is really committed to the cause of station editorializing with respect to candidates. If that is its position, it should be forthright and say so. On the other hand, if it believes that licensees should editorialize in this area, there is no reason for the specific notice and script-furnishing rules. There should not be different rules in this area than in the case of other political broadcasts. The test throughout should be the responsibility of the licensee. If the licensee is acting responsibly; if he discharges his duty fairly and honestly, his conduct should not be controlled. On the other hand, if the licensee acts irresponsibly, this bears upon his qualifications. The Commission's rules, however, treat the responsible and irresponsible broadcaster in the same way.

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8. The time has come for the Commission to make up its mind in the field of discussion programs and political editorials. The Commission indicates that it encourages licensees to engage in these activities but it subjects them to artificial and unnecessary restraints. The test here, as

in any other aspect of broadcasting, should be licensee responsibility. If a licensee exercises responsibility, its conduct should be unregulated. If a licensee acts irresponsibly, a question is presented of basic qualifications. However, if the licensee permits an irresponsible charge to be aired, he does not acquire responsibility by furnishing a copy of the charge to the person attacked and giving the person an opportunity to reply. On the other hand, if
232 a licensee is acting responsibly, why should he be placed in a strait jacket as to the manner by which he achieves overall balance? There is an urgent need for a thorough re-examination of the whole area covered by the notice.

Respectfully submitted,

MISSION BROADCASTING COMPANY
/s/ JACK ROTH
By Jack Roth, *President*

June 20, 1966

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1100 Federal Bar Building
1815 H Street, N. W.
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233 **Joint Comments**

1. The so-called "fairness doctrine" has been applied by the Commission to broadcast treatment of controversial issues of public importance. This doctrine, which had not been expressly established by the Communications Act or by Commission Rule, was initially propounded by the Commission in *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949). Since then, the Commission has applied the "fairness doctrine" in various situations, including license renewal determinations. The

scope and application of the "fairness doctrine" has been developed by the Commission through policy statements and rulings on individual cases.[1]

2. The Commission now proposes to incorporate into its Rules provisions dealing with two of the various aspects of the "fairness doctrine." In brief the Commis-
234 sion proposes (a) "to codify the procedures which licensees are required to follow in personal attack situations,"[1] and (b) "to implement the *Times-Mirror* ruling as to station editorials endorsing or opposing political candidates."[2]

3. The personal attack situation would be dealt with by proposed Sections 73.123(a) and (b) as follows:

> "(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (i) a script or tape (or an accurate summary, if a script or tape is not available) of the attack; (ii) notification of the date, time and identification of the broadcast; and (iii) an offer of a reasonable opportunity to respond over the licensee's facilities."
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> "(b) The provisions of paragraph (a) shall be inapplicable to attacks on foreign groups or foreign public figures or where such attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other

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[1] See, *e.g.*, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10416 (July 25, 1964).

[1] Notice of Proposed Rule Making, para. 3, April 8, 1966.

[2] Notice of Proposed Rule Making, para. 7.

such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign.

"Note: In a specific factual situation the fairness doctrine may be applicable in this general area of political broadcasts. See Section 315(a); Applicability of the Fairness Doctrine, 29 F.R. 10415."

Endorsement of, or opposition to, political candidates would be dealt with by proposed Section 73.123(c) as follows:

"(c) Where a licensee, in an editorial, endorses or opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to the other qualified candidate or candidates for the same office (i) a script or tape of
235 the editorial; (ii) notification of the date and the time of the editorial; and (iii) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities."

4. The undersigned licensees well recognize their obligation to operate consistent with public convenience, interest and necessity. Nonetheless, they believe that the "fairness doctrine" (including the proposed Rules to codify aspects of it) is not consistent with the First Amendment to the Constitution of the United States or with Section 326 of the Communications Act, and that, moreover, it thwarts, rather than serves, the public interest in free expression. Apart from these threshold objections, the proposed rules should not be adopted because there has been no showing of need for the proposed rules, because they do not offer reasonable assurance of achieving the objective—improved compliance—for which they have been proposed, because the matters to which the proposed rules are directed are not sufficiently precise to be sus-

ceptible to precise rules, and because liability for monetary penalties for violation of rules (to be assessed after the fact and with benefit of hindsight) should not be created in areas where reasonable men, acting in good faith under all of the circumstances presented, could reasonably differ on what is "fair conduct" in a particular situation.

I. The "Fairness Doctrine" Is Not Consistent With the Freedom of Speech Guaranteed By the First Amendment to the Constitution of the United States or With the Prohibition Against Censorship Contained in Section 326 of the Communications Act.

5. The Supreme Court has made clear that the freedoms of speech and press established by the First Amendment to the Constitution of the United States apply to
236 radio and television,[1] and that the protection afforded by these freedoms is not limited to past expression but also includes protection of future expression against prior restraints, such as those here proposed.[2] The Congress also expressly recognized the particular importance of freedom of expression in broadcasting by enacting Section 326 of the Communications Act which provides:

> "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications."[3]

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[1] See United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948); Superior Films v. Department of Education, 346 U.S. 587, 589 (1954).

[2] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 713-19 (1931); Cantwell v. Connecticut, 310 U.S. 296 (1940); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963); Freedman v. Maryland, 380 U.S. 51 (1965); Mills v. Alabama, 34 U.S. L. Week 4418 (U.S. May 24, 1966).

[3] 47 U.S.C. § 326 (1964 Ed.).

The Commission, as well, has repeatedly recognized the limitations placed on its powers by the First Amendment and by Section 326.[4]

6. It is possible to accommodate need for some degree of government regulation of radio (due to limitations on the spectrum) with the fundamental principles of free speech and free press. Thus, the Commission[5] has
237 in past cases properly refused to interfere with licensee discretion concerning specific program content,[1] except in those special situations where a recognized limitation on free speech comes into play[2]—for example, defamation[3] or indecent language.[4] The courts have also been strict in this respect.[5] Thus, in considering Commission regulations prohibiting certain kinds of program contests, it was ruled that insofar as some of the prohibitions "go beyond the scope of Section 1304 of the Criminal Code [prohibiting lotteries], they may be considered as a form of 'censorship' and to that extent they would be in violation of the First Amendment."[6] The

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4 Commission Policy on Programming, 20 R.R. 1901, 1905-6 (1960).

5 "Hence, the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that *the fulfillment of the public interest requires the free exercise of his independent judgment.*" Commission Policy on Programming, 20 R.R. 1901, 1908 (1960) (emphasis supplied).

1 Rev. J. Richard Snead, 15 R.R. 158, 160 (1957).

2 Commission Policy on Programming, 20 R.R. 1901, 1909 (1960).

3 Captain James I. Hamilton, 16 R.R. 170, 171 (1957).

4 Palmetto Broadcasting Co., 23 R.R. 483 (1962).

5 One court said "It is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the FCC." McIntire v. Wm. Penn Broadcasting Co. of Philadelphia, 151 F.2d 597, 599 (3rd Cir. 1945).

6 American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953); *aff'd*, 347 U.S. 284 (1954).

court went on to say that, even if the Commission felt that such programs had no value to society, they were as entitled to the protection of free speech as the "best" programs.[7]

7. Under the accommodation described above the Commission focuses on the importance of licensee responsibility but is not permitted to interfere with program decision-making. Thus, while the Commission properly may
238 prohibit certain network affiliation provisions which it feels could result in the licensee abdicating its discretion,[1] and expect its licensees to ascertain the needs and interests of the community to be served and to take them into account,[2] it cannot dictate which network programs should or should not be carried by an affiliate or dictate how a station should serve the needs of its service-area.

8. Freedom of speech is violated by, and censorship results from, the "fairness doctrine" in two ways—because it acts to inhibit a licensee from carrying programming it feels is in the public interest and because it forces a licensee to carry programming which it may feel is not in the public interest. For example, under the proposed candidate endorsement rule, if a station simply states that it favors the election of a certain candidate, it is required to allow replies which may go far beyond the station's endorsement in length and content. Moreover, this requirement would exist even if the station has

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[7] *Ibid.*

[1] National Broadcasting Co., Inc., 319 U.S. 190 (1943); see also Simmons v. Federal Communications Commission, 169 F.2d 670 (2nd Cir. 1948).

[2] Statement of AM or FM Program Service, Broadcast Application (AM-FM), Section IV-A, Attachment A; Suburban Broadcasters, 20 R.R. 52 (1960), 20 R.R. 951 (1960), *aff'd*, Henry v. Federal Communications Commission, 302 F.2d 191 (D.C. Cir. 1962); Commission Policy on Programming, 20 R.R. 1901 (1960).

previously aired, extensively and equally, the views of the opposing candidates. Thus, the effect of the proposed rule would be to discourage stations from taking editorial positions on candidates. This would be not only contrary to the First Amendment and Section 326 but also would be inconsistent with the Commission's apparent encouragement of stations to editorialize! *Report on Editorializing by Broadcast Licensees,* 13 FCC 1246 (1949). This infringement on free speech cannot be justified as one of the special limitations on the First Amendment customarily recognized by the courts, such as defamation, indecent language, or "clear and present danger."[1] There has been no showing of any countervailing public interest reason to expand the foregoing special limitations to include the "fairness doctrine." Quite to the contrary, it is clear that when a licensee has exercised his own best judgment as to how to deal with a controversial issue of public importance, this judgment must not be forced to yield to Commission formulae, procedures or rules, such as those comprising the "personal attack" and "candidate endorsement" areas under the "fairness doctrine."

9. Any doubt that may have existed on this point has been swept away by the Supreme Court's holding four weeks ago that the freedoms guaranteed by the First Amendment were abridged by a statute making it a crime for the editor of a daily newspaper to write and publish an editorial on election day urging people to vote a certain way on issues submitted to them. *Mills* v. *Alabama,* 34 U.S.L. Week 4418 (U. S. May 24, 1966). There the Court observed:

> ". . . Suppression of the right of the press to praise or criticize governmental agents and to clamor and

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[1] Schenck v. United States, 249 U.S. 47 (1919); Dennis v. United States, 341 U.S. 494 (1951), rehearing denied, 342 U.S. 842 (1951).

> contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free . . . . It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press." (34 U.S.L. Week 4419).

240 Moreover, in rejecting the lower court's argument that the statute was valid because it seemed "within the field of reasonableness" and served the "good purpose" of preventing editorials that could not be answered (in that case because of time factors) the Court said:

> ". . . We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime to do no more than urge people to vote one way or another in a publicly held election." (34 U.S.L. Week 4420).

Here, too, for example, a regulation that a station may not editorialize for or against a candidate without also inviting broadcast of a responsive statement on behalf of candidates opposing the one who was endorsed or on behalf of the candidate who was opposed by the editorial, without facing a fine of as much as $10,000, *is* a "muzzle" and *is* an abridgement of constitutionally guaranteed freedoms which cannot be saved by any test of reasonableness.

III. Even if the Proposed Rules Would Be Lawful, There Has Been No Showing That They Would Result In Improved Compliance—Their Stated Objective.

10. The Commission stated that it has proposed to adopt rules governing the instant two areas under the "fairness doctrine"—personal attack and support of or opposition to political candidates—to "make more precise licensee obligation in this important area" and to "assist the

Commission in taking effective action in appropriate circumstances when the procedures are not followed."[1] In short, the rules appear to be directed at curing problems of non-compliance and enforcement. However, the
241 Commission has made no showing that there is or has been a substantial problem of non-compliance or enforcement in these two areas under the "fairness doctrine," or that such problems as may have been encountered in these two areas are any more prevalent or significant than problems encountered in other areas under the "fairness doctrine" for which rules have not been proposed. Thus, the Commission has not shown the need for the proposed rules, even if it be assumed that such rules would be lawful.

11. Nor has the Commission shown that, whatever the present situation with respect to compliance and enforcement in the two areas, this would be improved by the proposed rules and their threat of lines. The fact is that the Commission, with its powers over renewal of license, appears to have achieved a high degree of compliance with and enforcement of its "personal attack" and "candidate endorsement" aspects of the "fairness doctrine" notwithstanding their doubtful legality.

12. Moreover, it is doubtful that improved compliance would in fact result from the proposed rules, for they present on their face new and troublesome questions about their scope and meaning. For example, the proposed provision dealing with attacks by a person "associated" with one candidate in a campaign upon a person "associated" with another candidate in the campaign could lead to great confusion as to what may be required of a station in a particular case. In the give and take of political campaigns it is not always clear who is "associated" with a

[1] Notice of Proposed Rule Making, paras. 3, 7.

candidates in a campaign, and it is not unheard of for candidate and others to become "disassociated" or to change associations during a campaign.

242 III. THE PROPOSED RULES SEEK TO CODIFY ASPECTS OF THE "FAIRNESS DOCTRINE" WHICH ARE UNSUITABLE FOR CODIFICATION; MORE PRECISE LICENSEE RESPONSIBILITY IN THESE AREAS WOULD NOT BE ACHIEVED BY THE PROPOSED RULES.

13. The Commission has stressed its view that the proposed rules would "emphasize and make more precise licensee obligation in this important area."[1] While the proposed rules, carrying with them the threat of fines, would inevitably "emphasize" the "personal attack" and "candidate endorsement" areas of the "fairness doctrine," the Commission's attempt to make licensee responsibility "more precise" in these areas is unnecessary, inappropriate, undesirable and unsuccessful.

14. Even assuming the lawfulness of the "fairness doctrine," the proposed rules are *unnecessary* to define "licensee obligation" because the Commission has already spelled out its views in these areas in its general policy statements and in case-by-case determinations. The proposed rules add little to the previously established Commission policy, and such new clarifications as are set forth in the proposed rules (*e.g.*, the one week requirement for personal attacks, the 24-hour requirement for candidate endorsement or opposition editorials, and the exceptions in the Note to proposed Section 73.123(b)) could all be covered by a further policy statement.

15. Again apart from their lawfulness, the proposed rules are *inappropriate* and *undesirable* because the areas they would cover should more properly be left to case-by-

[1] Notice of Proposed Rule Making, para. 8.

case determinations based on *all* of the facts of the
243 situation. The Commission itself has stated:

> "we recognize that in some instances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle . . . ."[1]

It simply has not been shown that there is reasonable basis for singling out for purportedly precise enforcement certain aspects of a concept so inherently imprecise as "fairness." What may reasonably be concluded to be "fair" in one case may not be "fair" in another, notwithstanding what a specific rule may purport to declare is "fair" in all cases.[2]

16. Finally, the proposed rules would be largely *unsuccessful* in achieving greater precision of licensee obligation with respect to important aspects of the personal attack and candidate endorsement areas, for in many instances they do not even focus on problem areas. Thus, for example, the proposed personal attack rule leaves open such important questions as (a) within what time a person must accept a station's invitation to respond to an attack or to a candidate endorsement or opposition editorial, (b) the matter of licensee inquiries into the willingness of an attacked person to pay for time for the response, (c) the time or other limitations a station may impose on a response to a candidate endorsement or opposition
244 editorial,[3] and (d) the proper relationship of Section 315 and the fairness doctrine where they over-

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[1] Notice of Proposed Rule Making, para. 4. See also paras. 5 and 7.

[2] Indeed, the proposed rules may be so vague as to present questions of due process.

[3] This point is particularly difficult in view of the Commission's statement that the person responding to a candidate endorsement or opposition editorial may be entitled to more than "equal time." Notice of Proposed Rule Making, para. 7.

lap.[1] Moreover, the proposed exception for attacks by candidates, their authorized spokesmen, or those associated with them in the campaign, *against other* candidates, spokesmen, or persons associated with them in the campaign, may well give rise to more problems than it solves. There is no indication of what qualities characterize "spokesmen or persons associated" with a candidate in a campaign. Nor, apparently, has any thought been given as to how a licensee would proceed to determine such questions within the time limits imposed, or what it would do if there were disagreement, even among the candidates, as to whether an individual was a spokesman or an associate. For all of their apparent simplicity and precision, the proposed rules fail to give guidance in important areas —areas in which a licensee could be subjected to fines if he makes a decision (often under time duress) with which, having the valuable twin benefits of opportunity for unhurried reflection and hindsight, the Commission or its staff may later disagree.

IV. Liability for Forfeitures Should Not Be Created in Areas As Inherently Imprecise as "Fairness" Where Reasonable Men in Good Faith Can Differ on What, in Fact, Is "Fair."

17. In support of the proposed rules the Commission states that they "will assist the Commission in taking effective action in appropriate circumstances when the procedures are not followed."[2] By this, the Commission apparently means that it would be able to
245 seek to impose fines of up to $10,000 for each willful or repeated violation of the proposed rules. This attempt to extend the Commission's power to levy for-

[1] Notice of Proposed Rule Making, paras. 5-7.

[2] Notice of Proposed Rule Making, para. 3.

feitures in an area as inherently imprecise as "fairness" would be undesirable.[1]

18. The Commission apparently recognizes the doubtful nature of seeking to apply monetary forfeiture procedures to the inherently imprecise area of "fairness," for it goes out of its way to stress that it does not *intend* "to use the proposed rule as a basis for sanctions against those licensees who in good faith seek to comply," and that it *intends* to limit sanctions to cases where "there could be no reasonable doubt under the facts that a personal attack had taken place."[2] But the inappropriateness of rules in the "fairness" area that could lead to monetary forfeitures simply cannot be cured by the present Commission's assurances of its present intentions. The fact is that both intentions and Commissioners can and do change. Moreover, the fact remains that under the proposed rules licensees will be forced to make decisions in the areas in question more at their peril than in the past. Cases which, with the benefit of hindsight and time for leisurely reflection, appear to present "no reasonable doubt," may not be so clear at the time licensee decision is required, especially when there are time pressures. A station that decides in a close case that a person has not been personally attacked, or that decides that a person who has been attacked is an exempt associate of an opposing candidate, could be fined if it is later determined
246 that it made an error of judgment on the question of whether there was in fact a "personal attack," or whether there was an exemption. Under these circumstances, the proposed rules unreasonably—indeed, unfairly—expose licensees to liability for fines as much as $10,000

[1] This would be especially true if "willful" is interpreted to include a conscious act even though taken without specific intent to violate a rule, and if "repeated" is interpreted to cover such situations as failure to give timely notice to two persons "attacked" in the same broadcast.

[2] Notice of Proposed Rule Making, para. 4.

for isolated "wrong" decisions. This defect is especially glaring in light of the absence of any showing of past or present widespread or serious departures from the Commission's "fairness doctrine" policies and rulings under present practices and procedures.

WHEREFORE, the Commission should not only not adopt the new rules here proposed, but should abandon altogether its unlawful "fairness doctrine."

Respectfully submitted,

CORINTHIAN TELEVISION CORPORATION (KOTV)
GREAT WESTERN BROADCASTING CORPORATION (KXTV)
GULF TELEVISION CORPORATION (KHOU-TV)
INDIANA BROADCASTING CORPORATION (WISH-TV and WANE-TV)
POST-NEWSWEEK STATIONS (WTOP, WTOP-TV and WJXT)
W.A.V.E., INC. (WAVE and WAVE-TV)
WFIE, INC. (WFIE-TV)
WFRV, INC. (WFRV-TV)

By /s/ EDGAR F. CZARRA, JR.
Edgar F. Czarra, Jr.

By /s/ JONATHAN D. BLAKE
Jonathan D. Blake

Covington & Burling
701 Union Trust Building
Washington, D. C. 20005
Their Attorneys.

June 20, 1966.

Letter of the American Civil Liberties Union

246-A AMERICAN CIVIL LIBERTIES UNION
156 Fifth Avenue
New York, New York 10010

June 17, 1966

Mr. Ben F. Waple, Secretary
Federal Communications Commission
2605 Avena Street
Wheaton, Maryland

Dear Mr. Waple:

The American Civil Liberties Union wishes to present its views on the Federal Communications Commission's proposed rule-making concerning the "fairness doctrine," and, more specifically, codifying the procedures which licensees are required to follow in personal attack situations and implementing the Commission's ruling on station editorials endorsing or opposing political candidates. (Docket No. 16574)

The Union's general support of the "fairness doctrine" was presented to the Commission in December, 1964. We endorsed the standards of the doctrine, which encourage the broadcasting of controversial points of view on public issues, as a significant step toward the implementation of the First Amendment's guarantee of freedom of expression, a guarantee designed to assure citizens a diversity of information and opinion. While noting that government regulation always holds the possibility of censorship, a danger to which civil libertarians are particularly sensitive, the ACLU stated its full backing for Commisison actions promoting diversity without interfering with program content.

In its 1964 statement the ACLU did express reservations, however, regarding the FCC's procedural requirements necessitating the submission of broadcast transcripts by

licensees to persons or groups attacked on the air. The Union was concerned lest the transcript procedure would place such an onerous administrative burden on the stations that it might result in their refraining from presenting controversial points of view at all. Questioning the advisability and practicality of such requirements, the Union urged the Commission to "re-evaluate them in light of their own experience and the practicalities of the broadcasting industry, especially in the context of this last election campaign [in November, 1964]".

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In considering the Commission's present proposal, the ACLU has re-examined its own position on the procedural implementation of the "personal attack" principle. Under the proposed rule-making, "a licensee would be required to send a tape, transcript or summary of the attack to the attacked person or group within a reasonable time and in no event later than one week after the attack. . . . Along with the copy, the licensee would be required to send the attacked person or group a notice stating when the attack occurred and containing an offer of a reasonable opportunity to respond." The rule-making would leave to the "reasonable judgment of the licensee and to good faith negotiations" such other matters as the imposition of a reasonable time limit in which the person notified would be required to respond.

The Commission's proposed rule-making specifically exempts personal attacks in the context of the discussion of controversial issues and personal attacks by political candidates, their spokesmen and their campaign associates. These two exemptions remove the core of the ACLU objection to the original, broader procedural arrangement, which we felt would impose too heavy a transcript requirement on the stations. Therefore, the Union supports the FCC's proposed rule, directed, as it is, to the one

category of attacks on individuals and groups. The Union believes that the Commission's revision of the rule represents a positive step in the direction of diversity of opinion on the air, and it will still adequately protect the individual against unanswered attacks, in the interest of innate fairness.

The Union also agrees with the Commission's further exclusion from the "personal attack" rule-making of foreign groups and foreign political figures. As a practical matter, the ACLU believes, it would be virtually impossible to notify all foreign figures attacked on the air, and, in any event, it would be most inhibiting of free discussion to impose such a requirement. For example, it would be obviously impractical, indeed absurd, to require stations to make the "personal attack" machinery available to such personalities as President Charles de Gaulle, or Queen Elizabeth, or President Ho Chi Minh.

Finally, the ACLU also endorses the Commission's proposed rule-making that "the appropriate candidate (or candidates) be informed of the station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and be given 24 hours notification of the editorial and an opportunity to respond," with notification being required prior to broadcast in the case of station editorializing close to the election. In terms of fairness to both the candidate and the electorate, this proposal provides the opportunity for the candidate to present his points of view on public issues with the greatest accuracy, and it gives the electorate the full information which it needs to make intelligent choices in exercising the right of franchise.

All in all, the Union believes that the proposed rule acts in the interest of broadcasting diversity, by broadening

the scope of debate on issues of current importance and by this letter is happy to support it.

Sincerely yours,

/s/ JOHN DE J. PEMBERTON, JR.
John de J. Pemberton, Jr.
Executive Director

/s/ HARRIET PILPEL
Harriet Pilpel, Chairman
Radio-TV Committee

JdeJP & HP/ck

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251 **Comment of the United Steelworkers of America, AFL-CIO**

(1) The United Steelworkers of America is a labor organization affiliated with the AFL-CIO. Founded in 1938 it now represents over 900,000 workers in the United States and Canada.

(2) The United Steelworkers' interest in the proposed rule on Broadcast Fairness is twofold. First, it is interested as an organization which forwards policies which in large regions of the country are controversial. Second, it is interested in obtaining for its members and the public at large, a well-rounded discussion of controversial issues which affect the community.

(a) Our primary interest in this rulemaking proceeding arises from our desire to obtain a fair hearing in our promotion of legitimate trade union policies. Past
252 history and present realities make it clear that the labor movement remains a controversial issue in large areas of our nation. This is especially clear in the

South. In the South a regional prejudice against the labor movement exists. This prejudice has in the past and continues in the present to make it difficult for labor organizations to present their side of organizing campaigns, collective bargaining disputes and other related union activities. Local newspapers, radio and television stations are often controlled by interests unfriendly and often actively hostile to the labor movement. The communications facilities in many communities have presented only one side of the issue in labor disputes. Unions have time after time been denied access to the public forum to present their side of disputes. Documentation of this blackout was presented in Hearings, Administration of the Labor Management Relations Act by the NLRB, before the Subcommittee on National Labor Relations Board, in 1961.[1] We believe that some of these obstacles can be removed by the enactment of the proposed rule as expanded by our suggested amendment (see Attachment No. 1).

253 (b) The Steelworkers has a second reason for urging the adoption of the expanded rule. Our membership of almost one million has an interest as citizens of this nation in obtaining an open and fair forum for discussion of ideas of interest to the community. The expanded rule would serve as a positive force for encouraging such discussion, insuring a more informed public. The policy of encouraging open discussion of controversial topics in the broadcasting industry was announced in 1948 by Congress in Section 315 (47 U.S.C.), of the Federal Communications Act. The Commission has consistently forwarded the Congressional policy.[2] The adoption of the expanded rule would be a step toward the realization of

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1 87th Cong. 1st sess. (1961), Part I, pp. 292-331.

2 Commission; 1949 Report, Editorializing by Broadcast Licensee, 13 F.C.C. 1246; Fairness Primer, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, F.C.C. 64-611, FR 10415.

a broadcasting industry in tune with the Congressional mandates.

(3) The broadcasting industry and its spokesmen in comments already presented on this issue seem to forget that a broadcast license is a public trust, not an ordinary property interest. The licensee must, under Section 315
254 of the Federal Communications Act, afford reasonable opportunity for the discussion of conflicting views on issues of public importance. The expanded rule will help the Commission carry out the intention of Congress.

The industry's argument rests on two grounds. First, the proposed rule would violate rights granted by the First and Fifth Amendments. Second, even if the rule is constitutional, it is unnecessary. The industry has failed to substantiate either of these arguments.

No court has ever upheld the industry's claim of total exemption under the First Amendment from Government regulation. The cases cited in a number of the industry's comments are applicable to newspapers but not to the broadcasting industry.[3] The broadcasting industry is not in the same position as newspapers are with regard to the protection of the First Amendment. This long standing view was made clear again in the recent case, *Office of Communications of United Church of Christ* v. *FCC*, F. 2d , March 25, 1966, before the United States Court of Appeals for the District of Columbia Circuit, where the Court made the following comment:

255 "A broadcaster has much in common with a newspaper publisher, but he is not in the same category in terms of public obligation imposed by law. A broad-

[3] *New York Times* v. *Sullivan*, 376 U.S. 254 (1963); *Mills v. Alabama*, 34 L.Week 4418, May 23, 1966.

caster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts the franchise it is burdened by an enfoceable public obligation. A newspaper can be operated at the whim or caprice of its owner, a broadcast station cannot."

This *United Church* case also makes evident the fallacy of the industry's Fifth Amendment argument. The broadcast license is not an ordinary property interest, it is a qualified grant of a monopoly subject to Government regulation. The licensee takes the property interest under an agreement to follow the rules laid down by the Commission. The industry is claiming an absolute property right which it never had.

The industry argues that even if the proposed rules are constitutional, they are unnecessary. The Congressional mandate is not an expression of an intent to leave to the industry the decision as to how it will act in this area. Self-regulation in many areas may be the best way of achieving the goals of national policy. The guarantee of a free forum for discussion in the broadcasting industry is not such an area. A free forum with access open to divergent points of view must be guaranteed. To allow one group, no matter how well motivated, absolute control over access to this forum would defeat the intention of Congress.

256 In summary we argue that the public interest can best be served through a clear codification of the fairness doctrine. To this end we support the proposed rule put forward by the Commission and urge its adoption. In addition, we urge two amendments to the proposed rule which would make it clear that Section 315 of the Federal Communications Act is carried out by guaranteeing the broadcast station will afford reasonable opportunity for the

discussion of conflicting views on issues of public importance. The amendments are attached.

Respectfully submitted,

/s/ ELLIOT BREDHOFF
Elliott Bredhoff
Michael Gottesman
Bredhoff & Gottesman
1001 Connecticut Avenue, N. W.
Washington, D. C. 20036
Attorneys for United Steelworkers of America, AFL-CIO

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257 AMENDMENTS SUGGESTED BY UNITED STEELWORKERS OF AMERICA, AFL-CIO

Amendment No. 1

Change the title to read:

"Sec. 73.123—Personal Attack; Political Editorials; Obligation to Encourage the Discussion of Controversial Issues."

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Amendment No. 2

Add the following paragraph:

"Nothing in the foregoing rule shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under the Federal Communications Act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

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FLORIDA ASSOCIATION OF BROADCASTERS

Gainesville, Florida

4th Floor, Stadium Building

Box 14444—University Station

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RESOLUTION IV

Fairness Doctrine

WHEREAS, the vast majority of broadcast station licensees make conscientious and sincere efforts to comply with the Commission's "fairness doctrine", and such compliance involves both judgment and good faith and is not susceptible to determination by the letter of a rule but only by the spirit of the policy,

THEREFORE, the Florida Association of Broadcasters, Inc., opposes the adoption of the Rules to control personal attacks and political editorializing as proposed in Docket 16574.

Adopted this 21st day of June, 1966 at Jacksonville, Florida.

/s/ ARNOLD F. SCHOEN, JR.,
President

Attest: KENNETH F. SMALL,
Secretary

346 **Memorandum Opinion and Order**

Adopted July 5, 1967; Released July 10, 1967

By the Commission: Commissioner Bartley dissenting and issuing a statement; Commissioner Loevinger concurring and issuing a statement; Commissioner Wadsworth absent.

1. On April 6, 1966 the Commission adopted a Notice of Proposed Rule Making (FCC 66-291) to provide procedures in the event of certain personal attacks and where a station editorializes as to political candidates. This Notice was published in the Federal Register of April 13, 1966 (31 Fed. Reg. 5710). Upon the request of the National Association of Broadcasters, the time for filing comments and reply comments was extended to June 20 and July 5, 1966, respectively (31 Fed. Reg. 6838, May 7, 1966).

2. Comments were timely filed by Carrol M. Barringer (WLCO), Bedford Broadcasting Corp. (WBIW), *et al.*,[1] Cape Fear Telecasting, Inc., Colorado Broadcasters Association, Columbia Broadcasting System, Inc., Corinthian Television Corp., *et al.*, Golden Empire Broadcasting Co., Griffin-Leake TV, Inc., Interstate Broadcasting Co., Meridith Broadcasting Co., Mutual Broadcasting System, Inc., Mission Broadcasting Co., National Association of Broadcasters, National Broadcasting Co., Inc., Storer
347 Broadcasting Co., Trigg-Vaughn Stations, Inc., WIBC, Inc. and WPSD-TV, generally in opposition to the rules. Comments favoring the rules were received

[1] On July 8, 1966 Bedford Broadcasting Corp., *et al.*, submitted, together with a motion to accept the Addendum, an Addendum to their comments, consisting of excerpts from an "Economic Analysis of Competition in the Daily Newspaper Business," prepared by Jesse Markham, Professor of Economics, Princeton University. No reason was given for the failure to submit the material in a timely fashion. The motion to accept the addendum is denied. (47 C.F.R. 1.415(d)).

from the American Civil Liberties Union,[2] Joseph H. Chislow, International Typographical Union (AFL-CIO), Laborers' International Union of North America (AFL-CIO), National Council of the Churches of Christ, National Rifle Association of America, The Pacifica Foundation, and the United Steel Workers of America, AFL-CIO.

3. The purpose of embodying the procedural aspects of the Commission's long-adhered-to personal attack principle and political editorial policy in its Rules is twofold. It will clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks and editorials regarding political candidates. Further, in the event of failure to comply with these rules, the Commission will be in a position to impose appropriate forfeitures (§ 503(b) of the Act) in cases of clear violations by licensees which would not warrant designating their applications for hearing at renewal time or instituting revocation proceedings but on the other hand do warrant more than a mere letter of reprimand. Of course, pursuant to § 503(b) of the Act, only the willful or repeated violation of these rules can result in forfeiture. We stress that the personal attack principle is applicable only in the context of the discussion of a controversial issue of public importance. See par. 10, *infra*.

4. These rules will serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine.[3] As set forth in the 1949 *Report of the Commission in the Matter of Editoriali-*

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[2] The informal comments submitted by the A.C.L.U. reflect an apparent mis-reading of the proposed rules in that the comments state the "rule-making specifically exempts personal attacks in the context of the discussion of controversial issues . . ." In fact this is the situation expressly covered by the proposed rules.

[3] The only new requirement in these rules are the time limits, discussed in paragraphs 12 and 15, *infra*, within which licensees must act to fulfill their substantive obligations when they have broadcast personal attacks or political editorials.

zation by Broadcast Licensees, 13 F.C.C. 1246 at 1249 (1949), "the development of an informed public opinion through the public dissemination of news and ideas concerning the vital public issues of the day" is the keystone of the Fairness Doctrine. "It is this right of the public to be informed rather than the right on the part of the government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter, which is the foundation stone of the American system
348 of broadcasting" *Ibid.* The Fairness Doctrine as a basic delineation of a standard of public interest in broadcasting was given specific Congressional approval in the 1959 amendment of Section 315(a) of the Communications Act, 73 Stat. 557, 47 U.S.C. 315(a). The personal attack principle is simply a particular aspect of the Fairness Doctrine. The principle stems from the Commission's language in the 1949 *Report* that "elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station . . ." 13 F.C.C. 1252. The standard of fairness similarly dictates that where a licensee editorializes for or against a candidate the appropriate spokesman for the conflicting point of view is the opposed candidate's representative, or, if the licensee so chooses, the candidate himself. "These concepts, of course, do restrict the licensee's freedom to utilize his station in whatever manner he chooses but they do so in order to make possible the maintenance of radio as a medium of freedom of speech for the general public." 1949 *Report, supra,* 13 F.C.C. 1250.

5. Several of the parties contend that the Fairness Doctrine and the personal attack principle are unconstitutional infringements of broadcasters' rights of free speech and free press under the First Amendment. We believe these contentions are without merit. We have discussed the constitutionality of the fairness doctrine generally in the *Report on Editorialization,* 13 F.C.C. 1246-1270. "We adhere

fully to that discussion, and particularly the considerations set out in paragraphs 19 and 20 of the Report." *Letter to John H. Norris* (WGCB), 1 F.C.C. 2d 1587, 1588 (1965). The court in reviewing the constitutionality of the personal attack principle of the Fairness Doctrine in *Red Lion*,[4] concluded "that there is no abrogation of the petitioners' [licensees'] free speech right . . . I find in the Fairness Doctrine a vehicle completely legal in its origin which implements by use of modern technology the 'free and general discussion of public matters [which] seems absolutely essential for an intelligent exercise of their rights as citizens,' *Grosjean* v. *American Public Press, supra* at 249." *Red Lion, supra*, at 41. As to these particular rules, we stress again that they do not proscribe in any way the presentation by a licensee of personal attacks or editorials on political candidates. They simply provide that where he chooses to make such presentations, he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint. That such rules are reasonably related to the public interest is shown by consideration of the converse of the rules —namely operation by a licensee limited to informing the public of only one side of these issues, i.e., the personal attack or the licensee's editorial.[5]

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6. The addition of Section 73.123(a), (b) (and also 73.300-FM; 73.598—Educational FM; 73.679-TV of identical language) to the Rules serves to codify what has long been the Commission's interpretation of the personal attack as-

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[4] *Affirmed sub nom., Red Lion Broadcasting Co., Inc.* v. *F.C.C.*, Case No. 19,938, D.C. Cir. (June 13, 1967).

[5] In situations not involving a personal attack or an editorial on a political candidate, the licensee may of course exercise his good faith reasonable judgment as to the appropriate spokesman for a contrasting point of view which the licensee determines should be presented. 1949 *Report, supra*, 13 F.C.C. at 1251.

pect of the Fairness Doctrine. *Report on Editorialization by Broadcast Licensees,* 13 F.C.C. 1246, 1258 (1949); *Clayton W. Mapoles,* 23 Pike & Fischer, R.R. 586 (1962); *Billings Broadcasting Co.,* 23 Pike & Fischer, R.R. 951 (1962). "Thus, we have repeatedly stated that when a licensee, in connection with its coverage of a controversial issue, broadcasts a personal attack on an individual or organization, it must 'transmit the text of the broadcast to the person or group attacked . . . either prior to or at the time of the broadcast, *with a specific offer of his station's facilities for an adequate response.*' Public Notice of July 26, 1963; Controversial Issue Programming, F.C.C. 63-734 (emphasis supplied)." *Springfield Television Broadcasting Corp.,* 4 Pike & Fischer, R.R. 2d 681, 685 (1965). This duty devolves upon the licensee, because other than in the case of a broadcast by political candidates, the licensee is responsible for all material broadcast over his facilities.

7. As the Notice pointed out, the Commission has set forth the obligation of a licensee when a personal attack occurs during the discussion of a controversial issue of public importance, i.e., the licensee must notify the individual or group attacked of the facts, forward a tape, transcript or accurate summary of the personal attack, and extend to the individual or group attacked an offer of time for the broadcast of an adequate response. See *Clayton W. Mapoles,* 23 Pike & Fischer, R.R. 586 (1962); *Billings Broadcasting Co.,* 23 Pike & Fischer, R.R. 951 (1962); *Times-Mirror,* 24 Pike & Fischer, R.R. 404 and 407 (1962); and *Springfield Television Broadcasting Corp.,* 4
350 Pike and Fischer, R.R. 2d 681, 685 (1965); *Radio De Land, Inc. (WJBS),* 1 FCC 2d 935 (1965). We notified all licensees of their responsibility in this respect, by transmitting to them the July 26, 1963 Public Notice (FCC 63-734) and the 1964 Fairness Primer, *supra.* Despite such notification and the Commission's rulings, the procedures specified have not always been followed, even when flagrant

personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now codify the procedures which licensees are required to follow in personal attack situations. These rules will in no way lessen the force and effect of the Fairness Doctrine as it obliges licensees who permit their facilities to be used for the discussion of controversial issues of public importance to afford a reasonable opportunity for the presentation of conflicting views. Nor do they detract in any manner from a licensee's duty not to "withhold from expression over his facilities relevant news or facts concerning a controversy or . . . slant or distort the presentation of such news." *Report on Editorialization, supra.*

8. The obligation for compliance with these rules is on each individual licensee as it is for compliance with the Fairness Doctrine generally. *Capitol Broadcasting Co.*, 2 Pike & Fischer, R.R. 2d 1104 (1964). Where a personal attack or editorial as to a candidate on a network program is carried by the licensee, the licensee may not avoid compliance with rules merely because the attack or editorial occurred on a network program. Of course, if the network provides appropriate notice and opportunity for response and the licensee carries such response, its obligation would be satisfied.

9. A major purpose of the rules is to clarify and make more precise the procedures which licensees are required to follow in personal attack situations. The long-applied standard of what constitutes a personal attack remains unaffected by this codification:

> [T]he personal attack principle is applicable where there are statements, in connection with a controversial issue of public importance, attacking an individual's or group's integrity, character, or honesty or like personal qualities, and not when an individual or group is simply named or referred to. *Applicability of the*

Fairness Doctrine in the Handling of Controversial Issues of Public Importance, Public Notice of July 1, 1964, footnote 6.

351 Thus, no matter how strong the disagreement as to views may be, the personal attack principle is not applicable (See *Letter to Pennsylvania Community Antenna Television Association, Inc.*, 1 FCC 2d 1610); it becomes applicable only where in the context of the discussion of a controversial issue of public importance, there is an attack on an individual's or group's integrity, etc., as noted above. As stated in the Notice of Proposed Rule Making, we recognize that in some circumstances there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle, such as whether a personal attack has occurred in the context of a discussion of a controversial issue of public importance, or whether the group or person attacked is "identified" sufficiently in the context to come within the rule. The rules are not designed to answer such questions. When they arise, licensees will have to continue making good faith judgments based on all of the relevant facts and the applicable Commission interpretations.[6] As we stated in the Notice of Proposed Rule Making, the rule will not be used as a basis for sanctions against those licensees who in good faith seek to comply with the personal attack principle. We point out that in the analogous case of the equal opportunities provision of Section 315, we have not employed sanctions in the situation where a licensee has a good faith, reasonable

[6] In appropriate cases, licensees can and should promptly consult the Commission for interpretation of our rules and policies.

This would be the appropriate procedure should there arise a question of the applicability of the principle to a factual situation, such as the hypothetical one posed by the National Broadcasting Company's comments, of an attack made in the context of a discussion of controversial issue of public importance, which does not itself constitute such an issue. We note that in our experience thus far, the attack made in the context of the controversial issue has been germane to the issue.

doubt as to the provision's applicability. The rules here are thus directed to situations where the licensees do not comply with the requirements of the personal attack principle as to notification and offer of time to respond, even though there can be no reasonable doubt under the facts that a personal attack has taken place (e.g., a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Communist). Statements that the rules will discourage, rather than encourage, controversial programming ignore the fact that the rules do no more than restate existing substantive policy—a policy designed to encourage controversial programming by insuring that more than one viewpoint on issues of public importance are carried over licensees' facilities. See footnote 3, *supra*. Further, we do not perceive any discouragement to controversial issue programming, except for a licensee who wished to present only one side of such programming—namely, the personal attack and not the response by the individual attacked.

352 10. Several of the comments in this proceeding indicate the mistaken impression that an attack on a specific person or group constitutes, itself, a controversial issue of public importance requiring the invocation of the Fairness Doctrine. This misconceives the principle, based on the right of the public to be informed as to the vital issues of the day, which requires that an attack must occur within the context of a discussion of a controversial issue of public importance in order to invoke the personal attack principle. The use of broadcast facilities for the airing of mere private disputes and attacks would raise serious public interest issues, but such issues are not the focus of the Fairness Doctrine.

11. Under the principle it has always been the duty of a licensee to forward to a person or group attacked notification of the attack and an offer of an opportunity to respond,

rather than to await a request or complaint from the person attacked. The notification requirement is of the utmost importance, since our experience indicates that otherwise the person or group attacked may be unaware of the attack, and thus the public may not have a meaningful opportunity to hear the other side. Again the rule adds no new burden in this respect to the obligations of a broadcast licensee. If an unawareness of this obligation presently exists among licensees despite the Commission's language in *Mapoles, Billings, Times-Mirror, Springfield Television,* the Public Notice of July 25, 1963, and the 1964 Fairness Primer, this only highlights the need for the rule.

12. Paragraph (a) of the rule places specific procedural responsibilities on the licensee over whose facilities a personal attack has been broadcast. A licensee is required to send the attacked person or group, within a reasonable time and in no event later than one week after the attack, a notice of the attack which states when the attack occurred and contains an offer of a reasonable opportunity to respond. Along with the notice, he is required to send a tape, transcript or accurate summary of the attack to the attacked person or group. This time limit should be sufficient to allow a licensee to confer with counsel or with the Commission if there is doubt as to its obligation. In any event, in the doubtful situation, if the person who possibly has been attacked is notified promptly within the time limit and the licensee seeks clarification of his obligation from his counsel or the Commission, no sanctions would be imposed, because the matter is not finally resolved within the one week period. See par. 9, *supra.*[7] This one week outer time limit does not mean that such a copy should not

[7] As we stated in the Notice of Proposed Rule Making, where a licensee determines that a personal attack has not occurred but recognizes that there may be some dispute concerning this conclusion, he should keep available for public inspection, for a reasonable period of time, a tape, transcript or summary of the broadcast in question.

be sent earlier or indeed, before the attack occurs,
353 particularly where time is of the essence. Other matters are left to the reasonable judgment of the licensee, good faith negotiations, and the Commission's interpretive rulings based on specific factual situations.[8]

13. As we pointed out in the Notice, following present policy (Public Notice of July 1, 1964, (Fairness Primer) FCC 64-611, 29 F.R. 10415, footnote 6) personal attacks on foreign groups or foreign public figures are excluded from coverage by the rule. Also excluded from coverage are personal attacks made by political candidates, their authorized spokesmen, or those associated with them in the campaign against other candidates, spokesmen, or persons associated with them in the campaign. The exclusion of attacks by candidates against other candidates recognizes that the "equal opportunities" provision of Section 315—and not the personal attack principle—is usually applicable to this situation. The Fairness Doctrine may, of course, be applicable to particular factual situations in the political broadcast field. See, Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. 315(a); Public Notice of July 1, 1964, *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 F.R. 10415 (1964).

14. Finally, subsection (c) of the rule clarifies licensee's obligations in regard to station editorials endorsing or opposing political candidates. The appropriate candidate (or candidates) must be informed of a station's editorial opposing his (or their) candidacy or supporting the candidacy of a rival, and must be offered a reasonable opportunity to respond through a spokesman of his choice

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[8] Where the attack occurs on paid time, a question has arisen as to whether the response can also be required to be on paid time. We have ruled on this matter in *Letter to John H. Norris (WGCB), aff'd sub nom., Red Lion Broadcasting Co., Inc.* v. *F.C.C., supra.* In view of our ruling, this is a matter not covered by the rule.

including, if the licensee so agrees, himself. The language of subsection (c) has been altered from that appearing in the Notice of Proposed Rule Making (FCC 66-291) to make clear that where an editorial endorses a candidate notice and offer of an opportunity to respond must be sent to his opponent, and where an editorial opposes a candidate such notice and offer must be sent to the opposed candidate.

15. The phrase "reasonable opportunity" to respond is used here and in the personal attack subsection because such an opportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a "reasonable opportunity" may require more than a few seconds if there is to be a meaningful response. See, *Final Report of the Senate Committee on Commerce*, S. Rep. No. 944, 87th Cong., 2d Sess., Part 6, page 7. Notification shall be within 24 hours of the editorial, since time is of the essence in this area and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial. In most cases licensees will be able to give notice prior to the editorial. Indeed such prior notice is required in instances of editorials broadcast close to the election date, i.e. less than 72 hours before the day of the election. For while such last-minute editorials are not prohibited, we wish to emphasize as strongly as possible that such editorials would be patently contrary to the public interest and the personal attack principle unless the licensee insures that the appropriate candidate (or candidates) is informed of the proposed broadcast and its contents sufficiently far in advance to have a reasonable opportunity to prepare a response and to have it presented in a timely fashion. We have accordingly made this requirement explicit in a proviso to subsection (c).

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16. As in the case of the personal attack subsection, the licensee may impose reasonable limitations on the reply, such as requiring the appearance of a spokesman for the candidate to avoid any Section 315 "equal opportunities" cycle.[9] The matter of scheduling responses is left to reasonable judgment and negotiation. Subsection (c) is directed only to station editorials endorsing, or opposing, political candidates. Situations containing aspects of both personal attacks and political endorsements or oppositions may arise, and in such cases rulings on the particular factual settings may be necessary. *Times-Mirror*, 24 Pike & Fischer, R.R. 404 and 407 (1962).

17. Authority for the rules herein adopted is contained in Section 4 (i) and (j), 303 (r) and 315 of the Communications Act of 1934, as amended.

18. Accordingly, IT IS ORDERED, that the rules contained in the attached appendix ARE ADOPTED, effective August 14, 1967.

FEDERAL COMMUNICATIONS COMMISSION*

BEN F. WAPLE
Ben F. Waple
Secretary

Attachment

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[9] Barring extraordinary circumstances, the choice of the spokesman is, of course, a matter for the candidate involved.

* See attached statements of Commissioners Bartley and Loevinger.
NOTE: Rules changes herein will be covered by T.S. III(64)-18.

APPENDIX

In part 73 §§ 73.123, 73.300, 73.598 and 73.679 all to read identically are added to read as follows:

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman, or persons associated with the candidates in the campaign.

Note: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, Section 315(a) of the Act (47 U.S.C. 315(a)); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candi-

dates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and the time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however,* That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

356 DISSENTING STATEMENT

OF

COMMISSIONER ROBERT T. BARTLEY

The Fairness Doctrine is in the process of being perfected on a case-by-case basis. I believe, therefore, that codification by rule is premature.

357 CONCURRING OPINION OF COMMISSIONER LEE LOEVINGER

(Re rule to provide procedure in case of personal attack, etc.)

I concur in the promulgation of a rule specifically providing for the right of reply by a person attacked in a broadcast and by political candidates disadvantaged by political broadcasts, as this seems correct in principle. However, I think that the rule would better achieve its purpose if it were drafted with a clearer delineation of scope and practical operation.

358 **Memorandum Opinion and Order**

Adopted: August 2, 1967 Released: August 7, 1967

By the Commission: Commissioners Bartley, Loevinger and Wadsworth absent; Commissioner Cox concurring in the result.

1. On July 5, 1967, the Commission adopted rules specifying procedures in the event of certain personal attacks and where a station editorializes as to political candidates. In subsection (b) of those rules, we exempted certain situations where the fairness doctrine generally, rather than the personal attack rule, may be applicable. In the processing of a recent complaint, we have become aware of a further instance where clarification of our rules is appropriate.

2. Specifically, the personal attack rule is inapplicable to the bona fide newscast or on-the-spot coverage of a bona fide news event. In these situations the general fairness doctrine is applicable, and licensees are required to make reasonable good faith judgments upon the particular facts of the case in accordance with that doctrine. See Section 315(a) of the Communications Act of 1934, as amended; *Applicability of the Fairness Doctrine In the Handling Of Controversial Issues of Public Importance,* 29 F.R. 10416. Thus, licensees must make good faith, journalistic judgments as to what is newsworthy and how it should be presented. If the licensee adjudges an event containing a personal attack to be newsworthy, in practice he
359 usually turns, as part of the news coverage to be presented that day or in the very near future, to the other side and again makes the same good faith journalistic judgment as to its presentation and what fairness requires in the particular circumstances. That is normal journalism and fairness in this area. To import the concept of notification within a week period, with a presentation of the person attacked on some later newscast when other news might normally be broadcast, is impractical and might

impede the effective execution of the important news functions of licensees or networks. Such a result is not intended under the rules adopted. Finally, the exemption is also being extended to on-the-spot coverage of a bona fide news event, since this category is akin to the newscast area; in this connection, we have also taken into account the consideration that the number of personal attacks occurring in on-the-spot coverage of bona fide news events is unlikely to be large in number, that the notification aspect is relatively less needed in this area, and that on the whole it can be administered readily by applying the fairness doctrine to the specific facts of each case, when and if disputes arise.

3. The exemption resulting from the above clarification does not extend, however, to editorials or similar commentary, embodying personal attacks, broadcast in the course of the newscasts. The foregoing considerations are inapplicable. Rather, since the licensee has chosen to present a personal attack in his editorial, he should not be the one to determine wholly what the public shall or shall not hear on the other side of a matter affecting the integrity, honesty, and like personal qualities of the person attacked. Under elemental fairness, the person attacked should be afforded a comparable opportunity to give that side, subject to reasonable conditions set by the licensee. See, e.g., Letter to *Station WALG,* FCC 65-50 (1965). More important, the person attacked is the most appropriate spokesman to inform the public of the other side of the attack issue. As noted, the time and practical considerations, discussed with respect to the news itself in par. 2, are not usually applicable to an editorial, and even if applicable in an attenuated form, are outweighed by the foregoing factors. Finally, the argument that this might impede the presentation of editorials containing personal attacks is simply an assertion by the licensee that he wishes to broadcast such an editorial, but only if he does not have to present the other side of the attack issue or if he can wholly control

what the public may hear concerning this other side, rather than permitting the person so vitally affected
360 by his editorial and with the most knowledge of the issue a reasonable opportunity to reach his listeners.[1]

4. It may be that experience will indicate the need or desirability of other revisions, clarifications, or waivers of the rule in particular factual situations. If so, we shall act promptly to make whatever changes the public interest in the larger and more effective use of radio requires. See, e.g., Section 4(b), Administrative Procedure Act. We stress again the purpose of the rules: To delineate better the licensee's responsibilities in this important area and to afford the Commission a further needed sanction to deal with those who flagrantly violate the underlying policies in situations where there is no reasonable question as to the licensee's responsibility.

5. Authority for the rules herein adopted is contained in Section 4 (i) and (j), 303 (r) and 315 of the Communica-

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[1] For similar reasons, we have exempted news documentaries. We note that the latter ordinarily do not involve the time and practical considerations discussed in par. 2, and that a documentary, even though fairly presented, may necessarily embody a point of view. We believe, therefore, that the person attacked can readily, and should be, afforded the reasonable opportunity to present his side, as the most appropriate spokesman to inform the public on a matter affecting his integrity, etc.

Similarly, the news interviews show, which is akin to many other talk programs, is not exempted. The licensee has chosen to provide one person with an "electronic platform" for an attack, and elemental fairness and the duty to inform the public in the most appropriate manner, dictate that he should afford the person attacked a comparable opportunity. Again, the considerations set forth in par. 2 are inapplicable.

Finally, we note that there are already certain exemptions where the attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign.

NOTE: Rules changes herein will be included in a revised edition of Volume III.

tions Act of 1934, as amended; see also, Section 1.108 of the Commission's Rules and Regulations.

6. Accordingly, IT IS ORDERED, that the rule revisions contained in the attached appendix ARE ADOPTED, effective August 14, 1967. See Section 4(c), Administrative Procedure Act. This proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION
BEN F. WAPLE
Ben F. Waple
Secretary

Attachment

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361 APPENDIX

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598(b) and 73.679 (b) are revised to read identically as set forth in § 73.123 below:

§ 73.123 Personal attacks; political editorials.

* * * * *

(b) The provisions of paragraph (a) of this section shall be inapplicable (i) to attacks on foreign groups or foreign public figures; (ii) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific

Erratum

factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315 (a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415.

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362 **Erratum**

In the Memorandum Opinion and Order in the above entitled matter, FCC 67-923, released on August 7, 1967, the first sentence of footnote 1. to paragraph 3. is corrected to read as follows:

[1] For similar reasons, we have not exempted news documentaries.

FEDERAL COMMUNICATIONS COMMISSION
/s/ BEN F. WAPLE
Ben F. Waple
Secretary

Released: August 9, 1967

363 **Memorandum Opinion and Order**

Adopted: March 27, 1968 Released: March 29, 1968

By the Commission: Commissioners Bartley and Loevinger dissenting and issuing statements; Commissioner Cox concurring and issuing a statement; Commissioner Johnson concurring in the result.

1. On March 8, 1968, the Commission and the Department of Justice requested the Court of Appeals for the Seventh Circuit to hold in abeyance the cases pending before it seeking review of our personal attack and political editorial rules (*Radio Television News Directors Assn., et al.* v. *United States,* Case Nos. 16,369; 16,498; and 16,499), and to authorize the Commission to revise the personal attack rules. Such authority was granted by the Court, by order dated March 22, 1968 and this memorandum opinion and order deals with that revision. Since the revision is of a relatively narrow nature[1] and directed only to subsection (b) of Sections 73.123, 73.300, and 73.598, we shall not repeat the discussion in our prior opinions pertinent to subsections (a) and (c).[2] In short, we remain of the same view as to the legality and desirability of the personal attack rule, and are revising only one portion of it. See *Red Lion Broadcasting Co.* v. *United States,* 381 F. 2d 908 (C.A.D.C.), *certiorari granted,* 88 Sup. Ct. 470.

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[1] Some other matters simply call for a common sense reading of the rule. Thus, if the person attacked has previously been afforded a fair opportunity to address himself to the substance of the particular attack, fairness and compliance with the rule have clearly been achieved. Similarly, as shown by the introductory phrase, "when, during the presentation of views on a controversial issue of public importance . . .", the rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in that discussion.

[2] See Memorandum Opinions and Orders, 8 F.C.C. 2d 721 (July 5, 1967; 32 Fed. Reg. 10303) and 9 F.C.C. 2d 539 (Aug. 2, 1967; 32 Fed. Reg. 11531).

2. The issue with which we are concerned here is the alleged inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licensees. Even on the basis of the materials presented by the Columbia Broadcasting System (CBS) to the Court for the first time, the showing as to inhibiting effects remains speculative. But in view of the policy considerations discussed below, we believe that a revision would be appropriate.

364 3. We have consistently sought to promote the fullest possible robust debate on public issues. See Letter to Storer Broadcasting Co., January 31, 1968, FCC 68-120. We have also stated our belief that the fairness doctrine promotes that goal. *Ibid.* CBS does not dispute the latter, but does claim, *inter alia*, that the personal attack facet of the doctrine inhibits the discharge of important broadcast journalistic functions in areas such as news analysis or commentary by its newsmen or the presentation of controversial public figures on its news shows. As in the case of the 1959 Amendments to Section 315, what is called for is "balancing public policy considerations" (H. Rept. No. 802, 86th Cong., 1st Sess., p. 4). On the one hand, we take into account the considerations set forth in our prior discussion pertinent to this claim (see Memorandum Opinion and Order, 9 F.C.C. 2d 539, n. 1) and our assessment of the present showing in this respect as to inhibitions. On the other hand, there are two important considerations which, taken together, do make the case for revision:

(a) The 1959 Amendments to Section 315 stressed the importance of broadcast journalism in informing the public "with respect to political events and public issues" (H. Rept. No. 802, 86th Cong., 1st Sess., p. 4) and, on that basis, exempted four categories of programs—bona fide newscasts, new interviews, and news documentaries, and on-the-spot coverage of bona fide news events—from the "equal opportunities" requirement of Section 315, stating that the

fairness doctrine would remain applicable. While there are practical differences in its impact, the personal attack facet can have some similarities to the "equal opportunities" requirement in its application in this area.

(b) We have not had problems in this area over our many years of applying the fairness doctrine. For example, the 1959 exemption has worked well with respect to political candidates and the fairness afforded them in these news-type programs. As a general matter, unlike areas such as editorializing by licensees or syndicated programming where we have found some flagrant failures by licensees to follow the requirements of the fairness doctrine with respect to personal attacks, there has been no similar pattern of abuses in these news categories. This may well stem from the consideration that what is involved is news gathering or dissemination—an area where the licensee must be scrupulously fair. See *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. 1246, 1254-55. As the Senate Report (No. 560, 86th Cong., 1st Sess.) stated in 1959, at page 11:

> "It should be noted that the programs that are being exempted in this legislation have one thing in common. They are generally news and information-type programs designed to disseminate information to the public and in almost every instance the format and production of the program is under the control of the broadcast station, or the network in the case of a network program."

365 In light of the above two considerations, we have decided to strike the balance in favor of exempting these news program categories, other than the news documentary. Such action avoids *any* possibility of inhibition in these important areas of broadcast journalism, without appearing to raise any greater problem of abuse than was the case in the 1959 exemption as to "equal opportunities."

The fairness doctrine remains specifically applicable to these programs. See Section 315(a); H. Conf. Report No. 1069, 86th Cong., 1st Sess., p. 5; see par. 5, below.

4. We are expanding the exemptions in (iii) of subsection (b) to include the bona fide news interview and news commentary or analysis in a bona fide newscast. Such commentary or analysis is an integral and important part of the news process involved in the category "bona fide newscast." The bona fide news interview is similarly a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments and as to which factor (b) in the above paragraph is applicable.[3] We have not exempted the labelled station or network editorial, even if occurring in one of these exempt categories. Where a licensee's editorial discussing an issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in the discussion, his action is akin to that in the political editorializing area. We have stated that the licensee has the right to editorialize (see Hearing before a Subcommittee of the House Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., pp. 83-94), but that right carries, we believe, the concomitant duty in these two instances of notifying the appropriate group, person, or candidate attacked and offering an opportunity to respond. See par. 3, Memorandum Opinion and Order, 9 F.C.C. 2d 539.[4] We note that in this area we have found instances of

[3] We stress that the program categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these categories, to the extent pertinent, will be followed in this field also. (See, e.g., H: Rept. No. 1069, 86th Cong., 1st Sess., p. 4, as to the legislative history of the term "bona fide news interview."

[4] We note that this duty is recognized in the industry. Thus, in 1963 the President of CBS told a Congressional committee that in 99 cases out of 100 CBS would try to get the subject of an adverse CBS editorial to reply, the 100th case being one where someone might want to come on and use foul language or other improper behavior. (1963 House Hearings on Broadcast Editorializing, pp. 266-267).

failure to comply fully with the requirements of the fairness doctrine. Finally, as stated, we have not exempted the news documentary. The Section 315 exemption is limited to bona fide news documentaries where the appearance of the candidate is incidental to the presentation of the subject matter of the documentary; his rivals may have no connection with the program at all. In the case where the licensee presents a documentary which makes the honesty, integrity, or character of a person an issue in its discussion of some controversial issue, the response of the person attacked is clearly germane and important to informing the public fully. There is no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time. Rather, the matter is one where the person's response can be readily obtained and, indeed, we would expect t[illegible] to be the usual practice. See note 4, *supra.*

366 5. As stated, the fairness doctrine is applicable to these exempt categories. Under that doctrine, the licensee has an affirmative duty generally to encourage and implement the broadcast of contrasting viewpoints (par. 9, *Report on Editorializing by Broadcast Licensees,* 13 F.C.C. at p. 1251). The licensee has considerable discretion in choosing ways to discharge that affirmative duty. See *Letter to Capital Broadcasting Co., Inc.* (*WRAL*), July 29, 1964, FCC 64-774. In the case of the personal attack there is not the same latitude. Under our revision with respect to the exempt categories, the licensee may choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issue; in that event, and assuming that the licensee has acted reasonably and fairly, the doctrine is satisfied. But if the licensee has not done so or made plans to do so, the affirmative duty referred to above comes into play. And here it obviously is not appropriate for the licensee to make general offers of time for contrasting viewpoints, either over the air or in other ways in his community. There is a clear and appropriate spokesman

to present the other side of the attack issue—the person or group attacked. Thus, our revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond.

6. In sum, since our goal is to encourage robust, wide-open debate, we have re-examined the question presented here, and have concluded that the application of the personal attack principle to these news-type programs can be more limited, thus simplifying the licensee's responsibility in fulfilling his journalistic functions without materially interfering with the public interest objectives of the personal attack principle. In so doing, we further accord with the 1959 Amendment to Section 315(a) of the Communications Act by which Congress sought to give greater latitude to licensees in carrying out their journalistic role in political campaigns toward the goal of an informed electorate. We believe similar considerations call for broadcast licensees to have largely comparable freedom in determining the method of presenting the contrasting viewpoints as to personal attacks occurring in the news-type programs here exempted. The long-standing and fundamental obligation of the broadcast licensee to present news impartially provides the foundation upon which we rely in exempting these news-type programs from the precise requirements of the personal attack rules so as to eliminate *any* possibility of inhibitory effects.[5]

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[5] We recognize that an argument can be made that news commentary or analysis within the bona fide newscast is exempted but comparable material is not exempted if broadcast outside one of the exempt program categories. The short answer is that we are following the line drawn by the Congress, which would also exempt a film clip of a candidate in, for example, a news analysis or commentary segment only if it comes within an exempt program. Further, while our action here exempts these categories upon the basis of the parallel to the 1959 Amendments and the absence of any pattern of abuse

367 7. We have acted here to expand the exemption of program categories further along the lines of the exemption made on August 2, 1967 (FCC 67-923),[6] on the basis of the notice and the comments received in this docket (No. 16574). In urging the adoption of the 1959 Amendments, the Senate Report (No. 562) states (p. 14):

> "... the public interest should benefit from it. If not, adequate opportunity to remedy it is available."

That is equally apt here, both from the standpoint of this revision and any other revisions which may be called for upon the basis of experience.

8. Authority for the rules herein adopted is contained in Sections 4(i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, that the rule revisions contained in the attached Appendix ARE ADOPTED effective April 5, 1968. See Section 4(c), Administrative Procedure Act. This proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION*

BEN F. WAPLE
Secretary

Attachment

* See attached statements of Commissioners Bartley, Loevinger and Cox.

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of fairness in these news areas, it is important to bear in mind that the action is taken as a precautionary step, to eliminate any possibility of inhibiting effects in these areas which were singled out by the Congress. We have found no such effects, and therefore stress that we are not saying or indicating that inhibition of robust, wide-open debate is appropriate or likely in areas other than those exempted here.

[6] While a further notice is not legally required, we considered the desirability of such a further notice. However, we believe that such a notice and further proceedings are unnecessary in light of the nature of our action and the grounds therefor (par. 3, *supra*), and would be undesirable in view of the uncertainty that would beset this important field during this critical election year period. Our present action also facilitates the earliest possible review of these rules—another highly desirable consequence.

NOTE: Rules changes herein will be covered by T.S. III(68)-1.

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598(b) and 73.679(b) are revised to read identically as set forth in § 73.123 below:

§ 73.123 Personal attacks; political editorials.

* * * * * * * * *

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance.* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

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369 *Dissenting Statement of Commissioner Robert T. Bartley*

I dissented to the Commission's action of July 5, 1967, adopting these personal attack rules and stated:

> "The Fairness Doctrine is in the process of being perfected on a case-by-case basis. I believe, therefore, that codification by rule is premature." (Docket No. 16547)

I hold to that view.

370 *Dissenting Opinion of Commissioner Lee Loevinger*

(Re: Revised personal attack rules)

This proceeding presents the issue whether the so-called "personal attack rules" as now revised by the Commission abridge free speech in violation of the First Amendment to the Constitution. No more important issue, has ever confronted this Commission. I dissent to adoption of the present rules because I believe that the Commission reasoning and procedure throughout this case have been wholly inadequate to the issue and that the rules as now revised are unwise, invalid, and unconstitutional in abridging free speech.

To see this matter in perspective it is useful to review the history of the problem. The Commission first squarely confronted the editorializing issue in Mayflower Broadcasting Corp., 8 FCC 333 (1941). The applicant there was accused of broadcasting "so-called editorials from time to time urging the election of various candidates for political office or supporting one side or another of various questions in public controversy." The Commission held that this was inconsistent with the responsibilities of a broadcast licensee, saying:

"Radio can serve as an instrument of democracy only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. A truly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably. In brief, the broadcaster cannot be an advocate. . . . And while the day-to-day decisions applying these requirements are the licensee's responsibility, the ultimate duty to review generally the course of conduct of the station over a period of time and to take appropriate action thereon is vested in the Commission." 8 FCC 340.

In that case the Commission accepted an affidavit of applicant promising not to broadcast any more "editorials" and renewed its license. The decision was unanimous.

In 1947 the Commission undertook, on its own motion, to review the prohibition against broadcast editorializing; and, after lengthy proceedings, it issued a report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949). Two Commissioners did not participate, one Commissioner issued additional views, one Commissioner issued a separate opinion, and one Commissioner dissented, so the report represented the views of only two, or possibly
371 three, of the seven Commissioners. Nevertheless, that report has continued to be regarded as the authoritative statement of Commission policy in this area up to the present time.

The 1949 report on editorializing cited the Mayflower case, with apparent approval, for the proposition that in the "presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in

the community on the various issues which arise." 13 FCC 1250.

The report said:

> "(E)ditorial expression may take many forms ranging from the overt statement of position by the licensee in person or by his acknowledged spokesman to the selection and presentation of news editors and commentators sharing the licensee's general opinions or the making available of the licensee's facilities, either free of charge or for a fee to persons or organizations reflecting the licensee's viewpoint either generally or with respect to specific issues." 13 FCC 1252.

Without expressly overruling the Mayflower case, the report concluded:

> "(W)e have therefore come to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness detailed above, is not contrary to the public interest." 13 FCC 1253.

In separate views, Commissioner Jones pointed out that the majority opinion contained no acknowledgement of the applicability of the First Amendment and stated that the Mayflower case was unconstitutional and should be expressly overruled. 13 FCC 1259, *et seq.* Commissioner Jones pointed out that the majority opinion equated "editorialization" with "news" and "comment." Commissioner Jones contended that the First Amendment required that broadcasters be free in this area, and stated that the majority opinion was unduly restrictive and unworkably vague. Commissioner Hennock dissented, contending that the Commission should continue to prohibit editorialization by licensees because the "standard of fairness as delineated in the report is virtually impossible of enforcement . . ." 13 FCC 1270.

The present case started with a Notice of Proposed Rulemaking issued by the Commission April 8, 1966, with Commissioner Hyde abstaining, Commissioner Bartley dissenting and Commissioner Loevinger absent. FCC 66-291. The Notice began by referring to the Fairness Doctrine, citing the editorializing report of 1949 as containing the "basic enunciation of this doctrine." The Notice referred
372 to several cases involving application of the Fairness Doctrine, and stated, "we now propose to codify the procedures which licensees are required to follow in personal attack situations" under the Fairness Doctrine.

On July 5, 1967, the Commission adopted the personal attack rules, in virtually the form previously proposed, with Commissioner Bartley dissenting, Commissioner Loevinger concurring with a separate statement, and Commissioner Wadsworth absent. 8 FCC 2d 721 (1967). The Commission opinion said that the purpose of codifying the personal attack principle in rules was to "clarify and make more precise the obligations of broadcast licensees," and to enable the Commission to "impose appropraite forfeitures . . . in cases of clear violations by licensees . . ." The Commission opinion also said, "These rules will serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine." The 1949 editorializing report was cited and a footnote added, "The only new requirement in these rules are [sic] the time limits . . ."

On August 2, 1967, the Commission, *sua sponte*, adopted a further "clarification" of the recently codified personal attack rules, Commissioners Bartley, Loevinger and Wadsworth absent, and Commissioner Cox concurring in the result. 9 FCC 2d 539 (1967). The amendment made the rules inapplicable

> "to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be ap-

plicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events.)"

The rules as thus formulated and adopted were attacked in the cases now pending in the Court of Appeals for the Seventh Circuit by the Radio Television News Directors Association, the networks and others. CBS filed a brief (in case no. 16,498) contending that the rules unconstitutionally abridge free speech and violate the Communications Act. The thrust of the argument was that the rules illegally burden the discussion of controversial issues of public importance in news analysis, news interviews, and news documentary programs. The brief was accompanied by an exhibit setting forth verbatim transcripts of some 31 commentaries by Eric Sevareid, some 34 extracts from the news interview series Face the Nation, and excerpts from 6 CBS news documentaries.

The CBS brief and accompaning exhibit convinced some of the Commissioners and legal staff that the rules would burden and inhibit news programs and commentary and that it was necessary to amend the rules in order to defend them successfully in the pending litigation. The Commission, therefore, instructed its legal counsel to seek permission in the Court of Appeals to amend the rules further, and, pursuant to such permission, has now adopted another amendment to the rules.

373 I dissent to the present action of the Commission for several reasons. First, the amendments now adopted, like the preceding rules, have been inadequately considered and are badly drafted. Second, the amendments are unreasonably and unconstitutionally vague. Third, the amendments will impose more regulation and a greater burden on the free expression of ideas and news than the rules without the amendments. Fourth, I have come to doubt the competence of a Government agency such as the

Commission to promulgate and administer rules such as these in the area of speech.

The first point is almost self-evident. The tortuous and changing course of the Commission with respect to the present rules is evidence of the inadequacy of research and consideration underlying the rules. Despite the lengthy period these rules have been pending since their proposal by the Commission, there has yet been no consideration of the numerous analogous and relevant statutes and precedents in other jurisdictions. More than 20 years ago the Commission on Freedom of the Press recommended:

> "As an alternative to the present remedy for libel, we recommend legislation by which the injured party might obtain a retraction or a restatement of the facts by the offender or an opportunity to reply." Chafee, Government and Mass Communications (1947) 801.

The problems involved in "personal attacks" on groups and individuals, and the various methods of dealing with such problems, including the "right of reply" statutes which had been enacted in numerous states and some foreign countries, were extensively discussed by Professor Zechariah Chafee, Jr., in 1947. Chafee, Government and Mass Communications (1947) pp. 77-195. More recently, there have been a number of scholarly published discussions of the policy, constitutionality and legislative background of the Fairness Doctrine. See Harry Kalven, Jr., Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15 (1967); Glen O. Robinson, the FCC and the First Amendment, 52 Minn. Law Rev. 67 (1967); Legislative History of the Fairness Doctrine, Staff Study for House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess. (Feb. 1968).

None of this material, the sources from which these discussions are derived, or the underlying facts or authorities,

has been examined, analyzed or considered by the Commission in relation to these rules. The memoranda on which the Commission has relied and the opinions it has issued consist of endless reiteration of the same vague, high-flown, meaningless phrases, quoted from prior Commission opinions and relying entirely on citations of prior Commission repetitions of the same language.

374 The opinion and version of the rules now adopted by the Commission has been hastily drafted, has not been discussed or considered with any care or at any length by the Commission, has not been subjected to any test of comment by others or even of careful analysis within the Commission, and is simply a hurried effort to buttress the Commission's argument in the cases now pending in the Court of Appeals. Regardless of the formal requirements of the Administrative Procedure Act, elementary principles of intellectual discipline require more than this for rational decision of an important problem. It is dubious whether the course followed here is ever warranted. It is clear that this procedure is wholly inadequate when we are dealing with First Amendment issues, involving, as they do, the most fundamental of our constitutional principles.

In the second place, the rules now adopted are intolerably and unconstitutionally vague. The rules as amended August 2, 1967, applied to "editorial or similar commentary" included in newscasts and similar programs. The substance of the present revision is to move "similar commentary" from the category of inclusion in the rules to the category of exclusion, leaving "editorials" in the rules. Thus, the rules as now revised apply to "editorials," whether or not included in newscasts or news programs; do not apply to "commentary or analysis" included in newscasts or news programs; yet may apply to "commentary or analysis" in some circumstances.

The distinction between "editorials" and "similar commentary" not only defies definition but is completely in-

consistent with all that the Commission has previously said on this subject. In the 1949 report on editorializing, which is still cited as the basic authority on this subject, editorializing is said to include the "presentation of news editors and commentators." The opinion on adoption of the present rules said that they made no change in substantive principles but merely codified existing precedents and added time limits. The present opinion offers neither rationale nor criterion for distinguishing between "editorials" and "commentary." Far from giving any enlightenment on this subject, the present opinion appears to be merely a random collection of words and phrases from earlier Commission opinions expressing the Commission's faith in robust discussion and regulation. Ever since the Mayflower case the Commission has continued to use the language and vocabulary of free speech to justify the regulation and restriction of broadcast speech. It is significant that the Commission has not yet explicitly repudiated the Mayflower opinion or the Commission power asserted there; and the Commission has never attempted to analyze, or even examine, the limitations on its own power flowing from the First Amendment. On occasion the Commission has suggested that, and it has often acted as though, the First Amendment imposed no limitation on Commission power. See
375 Loevinger, Religious Liberty and Broadcasting, 33 Geo. Wash. L. Rev. 631, 654, footnote 101. So the history of the Fairness Doctrine and the Commission opinions relating to it add confusion and obscurity rather than specificity or clarity to the opaque and unintelligible meaning of the present revision of the second clarification of the first clarification of the personal attack principle of the general Fairness Doctrine.

I have reviewed all of the Sevareid commentaries presented in the CBS Exhibit to its brief and am quite unable to determine whether any one of them is an "editorial" or "commentary" within the meaning of the rules. It would

seem that this exercise should have been undertaken before any revision to the rules was drafted; but, as pointed out above, the course followed here allowed no such precautions or efforts. It is clear that up to the moment of adoption of the present revision of the rules the Commission regarded "editorials" and "commentaries" as being synonymous. The present rules not only differentiate between these terms but make the application of the rules themselves turn upon that differentiation. This is clearly contrary to the mandate of the Constitution as construed by the Supreme Court.

The Supreme Court has said:

> "(S)tandards of permissible statutory vagueness are strict in the area of free expression * * *"
>
> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual applications of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."
>
> "Broad prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

N. A. A. C. P. v. [redacted]*utton,* 371 US 415, 432-433, 438 (1959). To the same effect are *Smith* v. *California,* 361 US 147, 151 (1959); *Cramp* v. *Board of Public Instruction,* 368 US

278, 287 (1961); *Ashton* v. *Kentucky*, 384 US 195 (1966); *Keyishian* v. *Board of Regents*, 385 US 589 (1967).

As I have previously pointed out, the proscription of statutory vagueness in this field applies at least as
376 strongly to administrative rules as to statutes. *F.C.C.* v. *American Broadcasting Co.*, 347 US 284 (1954); *Bridges* v. *California*, 314 US 252 (1940); *Anti-Defamation League of B'nai Brith*, 6 FCC 2d 385, 393, 395 (concurring opinion of Commissioner Loevinger). It therefore appears that the present rules are void for vagueness.

However, there is a third and greater vice in these rules. This is that the rules as now revised will limit and burden speech to a degree that makes broadcast expression of views subject entirely to the whim of the Commission or its staff.

It is clear from the circumstances of adoption of the present revision, and will not be controverted by the Commission, that the purpose of the present revision is to exempt from the rules commentary of the kind contained in the CBS Exhibit to its brief. Much of the force of the CBS argument derives from the great respect which the Commission, its lawyers and the public have for Eric Sevareid. It would not be inappropriate to call the present revision of the rules the "Eric Sevareid rule." Certainly it is the intention of the Commission to exempt the Eric Sevareid commentaries from its personal attack rules.

However, the Commission cannot draft or apply rules that operate on the basis of its attitude toward particular individuals. If the commentaries of Eric Sevareid are entitled to exemption from the rules, then so are the commentaries of Richard Cotton, Carl McIntire, and a host of other lesser commentators. This does not imply that Eric Sevareid is comparable to other commentators in any respect other than that of being a commentator. But that

is all we are entitled to consider under the law. I yield to no man is my respect for Eric Sevareid. But I think I know Eric Sevareid well enough to assert that he would neither seek nor approve a rule which exempted him from regulatory requirements of the Commission while subjecting commentators with other views to such regulatory requirements.

The effect of the vagueness and lack of definition or criterion in the revised rules is that there is simply no means of ascertaining what may be considered a "commentary" and what may be considered an "editorial." The result is going to be that opinions which the Commission, or, more often, its staff, finds pleasing or tolerable will be called "commentaries" and exempted from the rules, while opinions which the Commission or its staff finds unpleasant or intolerable will be called "editorials." There is no principle involved in this distinction and not even an attempt to provide a verbal facade to mask the arbitrary choice which the Commission reserves to itself in categorizing broadcast expression of views on current topics as "commentary" or "editorial." Thus, under the revised rules the Commission and its staff would have the untrammelled power to say that any broadcast expression of views or analysis related to any matter of current interest is either subject to these rules or not
377 subject to these rules. Unless the Commission grants blanket exemptions to commentators by name, no commentator will know from one broadcast to the next whether his comments are subject to the rules or not. The Commission and its staff will be involved in an endless series of rulings as to the status of individual broadcasts, and every newscaster and commentator will operate in constant peril of being declared under the rules, and therefore subject to penalties, without any means of knowing in advance what the status of a particular broadcast will be. Such uncertainty and arbitrary power will be even greater

burdens on broadcasters than those which CBS presented in persuading the Commission to adopt the present revision.

Further, the present rules will be greater burdens on free speech than those which the Supreme Court has found in other cases to be unconstitutional. The personal attacks which come within the present rules are not merely the kind of vicious verbal assaults suggested by the term "attack." On the contrary, even a fair, factual and temperate statement that reflects adversely on a group or individual constitutes an "attack" under the present rules. (Numerous examples are set forth in the CBS Exhibit.) Consequently whenever there is a broadcast statement of fact or opinion that may reflect adversely on any individual or group the broadcaster must either determine that the statement is within one of the exemptions to the rule (such as exempt "commentary") or follow the precise procedure prescribed by the rule as to notification and offering time to reply. If the broadcaster guesses wrong on this—that is, if his judgment differs from that of the Commission or its staff —then he is subject to forfeitures which may aggregate $10,000 or to revocation or denial of renewal of his license. Such penalties are considerably more severe than those involved in cases such as *Terminiello* v. *Chicago,* 337 US 1 (1949), where free speech was held unconstitutionally burdened by an ordinance providing fines of $100 to $200.

The Commission will, of course, strongly and sincerely protest that it will not enforce these rules in a crude or oppressive manner, that whether a statement is held to be a "commentary" exempt from the rules or an "editorial" subject to the rules will not depend upon the Commission or staff approval or disapproval of the views expressed, and that only "flagrant" violations of the rules will be subject to penalties. But constitutional rights, particularly in the field of free speech, cannot be made dependent on the good-will, self-restraint or discretion of administrative

officials. *Cantwell* v. *Connecticut,* 310 US 296 (1940); *Bantam Books* v. *Sullivan,* 372 US 58 (1963).

Thus I come to the fourth reason to dissent to adoption of the revised rules, which is that they give the Commission greater power to influence or control the expression of ideas than should be given to any Government agency.

378 In the case of Brandywine-Maine Line Radio, decided by the Commission March 19, 1968, FCC 68-298, I dissented from the refusal of the Commission to suspend proceedings in a case involving application of the personal attack principle of the Fairness Doctrine pending determination of the Commission position in the present proceedings. The event has justified my position, for the Commission has either substantially changed the scope and application of the personal attack principle or rendered its application uncertain and arguable in many common situations or both. The concurring opinion in that proceeding suggests that there may be some inconsistency in the fact that I "originally endorsed" the personal attack rules, but now "regard [the rules] with distaste." The point is worth explanation.

When the personal attack rules were adopted I concurred, stating that "the right of reply by a person attacked in a broadcast and by political candidates disadvantaged by political broadcasts . . . seems correct in principle." My opinion added that "the rule would better achieve its purpose if it were drafted with a clearer delineation of scope and practical operation." Events since then, including the several revisions which the Commission has made in the rule, certainly demonstrate that the latter judgment was entirely correct. But there is a more important point.

When the rule was adopted I thought that the "right of reply" for a person unfairly attacked or wronged in a broadcast or publication was a wise and just principle

if embodied in a clear and practical statement. I am still of that opinion. However, I have come increasingly to doubt the ability of the Commission either to formulate a clear and practical statement of the principle or to administer such a principle wisely and justly. It is neither necessary nor appropriate to attempt to show that the Commission has been unwise or unjust in its regulatory actions in this area. It is enough to say that there are serious doubts as to the wisdom and justness of its actions. Let us note only recent examples.

The Commission initially ruled that the Fairness Doctrine was applicable to cigarette advertising after receiving a single letter of complaint and without notifying the station, examining any of the advertisements, or permitting or receiving any response to the complaint. See 9 FCC 2d 921, 952, 953 (1967) (concurring opinion).

In the KING cases the Commission undertook to judge precisely the amount and distribution of response time that was adequate or inadequate for a candidate who was not attacked but whose opponent was endorsed in broadcast editorials. See FCC 67-1194; 67-1049; 11 RR 2d 628 (1967); and footnote 34 at pages 27-28 of the CBS Brief.

379 In the Brandywine-Main Line case, cited above, a licensee was in hearing on an application for renewal of its license with a principal issue being compliance with the personal attack principle of the Fairness Doctrine. After the Commission moved the Court of Appeals for permission to revise that principle (or the Commission's interpretation or codification of that principle), the Commission refused to suspend the Brandywine-Main Line hearing long enough to permit the parties there to learn what the Commission's revised version of the personal attack principle might be. Thus the Commission in effect held that the personal attack principle should mean one thing in proceedings then pending before it but something

else in the court cases in which the Commission is defending the validity of that principle.

In the present matter the Commission's changeable, erratic and confusing course in its efforts to codify and clarify its own uncertain precedents demonstrates an absence of such consideration, skill and precision as is required in this area.

Perhaps it is inherent in the institutional administrative process, particularly of agencies burdened with the overwhelming volume of the FCC, that the scope of consideration will be limited, specialized and parochial and the skills will be technological. See Loevinger, The Administrative Agency as a Paradigm of Government, 40 Indiana L.R. 287 (1965). If so, that cannot serve to validate unwise or unconstitutional policies. But it does warn that such agencies are not the appropriate bodies to formulate rules of social policy; and that they should regulate only within the fields of their specialized technical competence.

Certainly in the area of First Amendment freedoms doubts should be resolved against the existence or exertion of government power to control. It seems to me that it is peculiarly inappropriate for an administrative agency to make rules creating or extending its own power in the area of First Amendment freedoms. Here, more than elsewhere, the creation or delegation of power and the formulation of rules should be by elected legislative bodies, with only enforcement and application left to administrative agencies. The Commission course with respect to these rules argues strongly against the wisdom of their adoption. The rules as revised seem clearly to burden, and thus abridge, free expression through the broadcast media. In case of even arguable conflict between administrative action or power and First Amendment protections I will not hesitate to resolve every doubt in favor of maintaining the First Amendment freedoms.

I join fully in the majority opinion in this matter, but believe it desirable to comment on certain of the statements in Commissioner Loevinger's dissent. Due to the pressure of time I will touch on only a few of the points he tries to make—there are others which are either inaccurate or irrelevant, but which cannot be treated adequately in the time available.

On page 3 of his dissent,[1] Commissioner Loevinger asserts that "The CBS brief and accompanying exhibit convinced some of the Commissioners and legal staff that the rules would burden and inhibit news programs and commentary and that it was necessary to amend the rules in order to defend them successfully in the pending litigation." I do not think this is true. Since this assertion purports to analyze and characterize the mental processes of others on the basis of discussion in a Commission meeting which was confidential and closed to the public, I believe it inappropriate to comment further, except to say that I know of no basis for this statement. The grounds for our action are clearly set forth in our opinion, which points out that we do *not* believe that the personal attack rule, as originally drawn, inhibited free discussion or was otherwise invalid, but concludes that we should make a minor revision in the rule to parallel Congressional policy in the 1959 amendments to Section 315 of the Communications Act, thereby removing any possible claim of inhibitory effect in the vital news areas favored by Congress and in which no pattern of abuse has developed. Commissioner Loevinger's effort to confess error for the majority of his colleagues is not only without factual basis, but is also presumptuous. He is free to discuss the facts involved

[1] The page references used herein have reference to the typewritten version of the dissent available at the time of preparation of this opinion.

in the pending litigation and to set forth his view of the applicable law. But I do not think he can give aid to the parties challenging the Commission's rule by publicizing an inaccurate version of the views of other Commissioners and members of our staff expressed in the discussions leading up to the official action reflected in our opinion.[2]

381 Commissioner Loevinger first argues (page 4) that the amendments the majority have adopted "have been inadequately considered and are badly drafted." As I noted in my earlier concurring opinion in this matter, I do not recall that he offered any suggestions for revision of the form of the rule adopted on July 5, 1967.[3] Instead, he concurred in the adoption of the rule but added that "the rule would better achieve its purpose if it were drafted with a clearer delineation of scope and practical application." I don't know quite what that meant, but it has served as a handy escape hatch now that Commissioner Loevinger has changed his mind about the feasibility of regulating personal attacks by rule. Perhaps because of that, he has not made a single suggestion for improving the form of the revised rule we have now adopted. He likes to complain of the poor quality of draftsmanship displayed by all of the rest of us, but is chary about contributing to improved performance of our duties in this area.

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[2] As I have indicated before [Public Notice of March 1, 1968, Mimeo No. 13493, concurring statement] I did not originally favor revising the rule, because I think that it is valid in the form before the Court and that it would not inhibit freedom of speech or journalistic expression by qualified and effective licensees. Indeed, while I concurred in the modification of the rule last August, I did not believe it necessary or completely desirable. I have always believed that fairness in the personal attack field is best served by a prompt and willing offer of time to reply, and believe that this not only is fair to the person attacked but also permits licensees to present any material they consider in the public interest—except for the well recognized exceptions of obscenity, incitement to riot, etc.

[3] 8 FCC 2d 721.

Commissioner Loevinger says we have followed a "tortuous and changing course" with respect to this rule. It is true that we have twice modified the rule, but always in the same, consistent direction and for the sole purpose of removing any possible grounds for concern that the rule would inhibit freedom of speech in the area of broadcast news. The rule adopted in July 5, 1967, provided, in substance, that when, in discussion of a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a specified time, transmit to the person or group attacked a notice of the broadcast, a script, tape, or summary of the attack, and an offer of time to respond. Exceptions were made for attacks on foreign groups and public figures and for attacks on candidates or their associates by other candidates or their associates.

On August 2, 1967, we amended the rule on our own motion to provide an additional exemption for bona fide newscasts and on-the-spot coverage of bona fide news events.[4] As is true of all the exceptions provided for in the rule, the general Fairness Doctrine remains applicable. That narrowing of the applicability of the rule itself was designed—like the change now being made—to eliminate any possibility that our rule "might impede the effective execution of the important news functions of licensees or networks." We indicated at that time that the added exemption did not extend "to editorials or similar commentary, embodying personal attacks, broadcast in the course of the newscasts." We have now decided that commentary within newscasts and the other exempted news formats should also be excluded from the rule—though still subject to the Fairness Doctrine—but have again con-

[4] 9 FCC 2d 539.

cluded that the licensee's editorials should be subject
382 to the rule. In formulating our August 2, 1967, revision we also considered news documentaries and news interviews but decided not to take them out of the rule. We have now reconsidered and are acting to exempt news interviews, while still leaving news documentaries subject to its requirements. We said, in our Memorandum Opinion and Order of August 2, 1967:

> "It may be that experience will indicate the need or desirability of other revisions, clarifications, or waivers of the rule in particular factual situations. If so, we shall act promptly to make whatever changes the public interest in the larger and more effective use of radio requires."

We have now done just that. We have not moved erratically, but in a single coherent direction, to meet the concerns of responsible people that the rule might inhibit broadcast journalism. While I do not fully agree that those concerns were valid, I think that the effort to eliminate any possible inhibitory effect is commendable.

Commissioner Loevinger cites certain published commentaries on freedom of the press and on the Fairness Doctrine,[5] and then says:

> "None of this material, the sources from which these discussions are derived, or the underlying facts or

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[5] He refers to three articles on the Fairness Doctrine. Prof. Kalven's paper "is largely based on a memorandum written a year ago for the Columbia Broadcasting System." CBS is one of the parties challenging our personal attack rule. Prof. Robinson was one of the participants in a panel discussion before the House Subcommittee on Investigations, while Mr. Manelli is a member of that Committee's staff. Toward the end of the two-day consideration of Fairness and Section 315, Representative William L. Springer, ranking minority member of the full Committee on Interstate and Foreign Commerce, is quoted as saying "I don't believe anyone on this Committee favors abolishing the fairness doctrine." See *Television Digest*, Vol. 8, No. 11, March 11, 1968.

authorities, has [sic] been examined, analyzed or considered by the Commission in relation to these rules. The memoranda on which the Commission has relied and the opinions it has issued consist of endless reiteration of the same vague, high-flown, meaningless phrases, quoted from prior Commission opinions and relying entirely on citations of prior Commission repetitions of the same language."

I do not think that this is true. Commissioner Loevinger is again attempting to characterize the processes by
383 which others have reached conclusions with which he now disagrees—though he has not in the past. We have a competent legal staff to advise us on these matters, and some of the rest of us try to keep up with relevant commentary to the extent our attention to other duties permits. We have tended to rely substantially on our own experience, as reflected in our decisions disposing of specific Fairness complaints—in most of which Commissioner Loevinger joined.

Specific attention must be given to the sentence at the top of page 5 of Commissioner Loevinger's opinion to the effect that this revision of the rule "has not been discussed or considered with any care or at any length by the Commission, has not been subjected to any test of comment by others or even of careful analysis within the Commission, and is simply a hurried effort to buttress the Commission's argument in the Court of Appeals." While it is true that our consideration of this matter had to meet the Court's schedule,[6] this important action was fully discussed by the Commissioners, after substantial basic staff work. I do not presume to speak for my colleagues, but I know I gave the matter most careful attention, going

[6] I have already addressed myself to Commissioner Loevinger's charge that we are simply trying to improve our posture in Court. See item referred to in Note 2, *supra*.

over it several times with different elements of our staff and suggesting changes in the language proposed. As for acting without further Notice of Proposed Rulemaking, our reasons are set out in Note 6 in the majority opinion. Commissioner Loevinger never pressed for such notice and, indeed, fully subscribed to the desirability of the procedure we have followed, which will facilitate the earliest possible review of this important matter by the Court.

Commissioner Loevinger's second argument is that the rule is now unconstitutionally vague. On pages 5 to 7, he asserts that it is impossible to differentiate between "editorials" and "commentary". I think the difference is clear.

It is true that the 1949 Report on Editorializing by Broadcast Licensees said:

> "11. It is against this background that we must approach the question of 'editorialization'—the use of radio facilities by the licensees thereof for the expression of the opinions and ideas of the licensee on the various controversial and significant issues of interest to the members of the general public afforded radio (or television) service by the particular station. In considering this problem it must be kept in mind that such editorial expression may take many forms
> ranging from the overt statement of position by the
> 384 licensee in person or by his acknowledged spokesmen to the selection and presentation of news editors and commentators sharing the licensee's general opinions or the making available of the licensee's facilities, either free of charge or for a fee to persons or organizations reflecting the licensee's viewpoint either generally or with respect to specific issues. It should also be clearly indicated that the question of the relationship of broadcast editorialization, as defined above, to operation in the public

interest, is not identical with the broader problem of assuring 'fairness' in the presentation of news, comment or opinion, but is rather one specific facet of this larger problem."

• • •

"13. The narrower question of whether any overt editorialization or advocacy by broadcast licensees, identified as such is consonant with the operation of their stations in the public interest, resolves itself, primarily into the issue of whether such identification of comment or opinion broadcast over a radio or television station with the licensee, as such, would inevitably or even probably result in such over-emphasis on the side of any particular controversy which the licensee chooses to espouse as to make impossible any reasonably balanced presentation of all sides of such issues or to render ineffective the available safeguards of that overall fairness which is the essential element of operation in the public interest. We do not believe that any such consequence is either inevitable or probable, and we have therefore come to the conclusion that overt licensee editorialization, within reasonable limits and subject to the general requirements of fairness detailed above, is not contrary to the public interest."[7]

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[7] 13 FCC 1246, at p. 1252 (1949). The Commission thus tacitly reversed the ultimate holding in *Mayflower Broadcasting Corp.*, 8 FCC 333 (1941), while continuing to cite it with respect to the basic requirement of Fairness. Contrary to Commissioner Loevinger's charge, the Commission expressly considered "the limitations on its own power flowing from the First Amendment" in the Editorializing Report, and stated: "We fully recognize that freedom of the radio is included among the freedoms protected against governmental abridgement by the first amendment." We have often considered the matter since then. *Pacifica Foundation*, 36 FCC 147 (1964). *Anti-Defamation League of B'nai B'rith*, 4 FCC 2d 190 (1966), 6 FCC 2d 385 (1967). I do not think we have taken any action violative of the First Amendment.

I think this recognizes a distinction between editorialization in general—the injection of the licensee's
385 opinions in program matter—and editorials—discrete program elements clearly presenting the licensee's opinions as such, which the Report calls "overt editorialization." In the years since this distinction has become quite clear and is generally understood in the broadcast industry. Thus *Editorializing on the Air*, 2nd edition, 1962, prepared by the Committee on Editorializing of the National Association of Broadcasters, defines editorials as follows:

> "A broadcast editorial is an on-the-air expression of the opinion of the station licensee, clearly identified as such, on a subject of public interest."

I do not think, therefore, that broadcasters will have the difficulty with this distinction which Commissioner Loevinger does. As he himself correctly points out, "the rules as now revised apply to 'editorials,' whether or not included in newscasts or news programs; do not apply to 'commentary or analysis' included in newscasts or news programs; yet may apply to 'commentary or analysis' in some circumstances." I would only add, by way of clarification, that the rule *is* clearly applicable to commentary or analysis not included in any of the three exempt news type programs.

The Commission is here exempting all commentary or analysis *in* newscasts or other exempt programs, since such commentary or analysis is an integral part of the news function; it can, for example, occur at any point in a newscast and, indeed, the trend is more and more toward such "in depth" presentation of the news. What is not exempt is the *labelled editorial of the licensee*. To put it in terms of the situation of CBS, as Commissioner Loevinger does, the commentary and analysis of Walter Cronkheit and Eric Sevareid in newscasts are exempt, but the presenta-

tion by a network official, or by an announcer, of the editorial opinion of CBS is not. No real problem of differentiation is presented, and the reasons for the different treatment are set out in the majority opinion. I think that there is a great difference, in terms of the policy considerations with which we are dealing, between presentation of the news, in all its forms, and the labelled editorial opinions of the licensee. Finally, our revision does not turn on Eric Sevareid or any other particular person, though it is useful to discuss the issue in such personalized terms. Rather, our changes in the rule are based on the same considerations that moved Congress to amend Section 315 of the Act in 1959, and our action extends to all these news programs without regard to the individuals who may be involved in presenting them.

Commissioner Loevinger's third objection to the revised rule is that it "will limit and burden speech to a degree which makes broadcast expression of views subject entirely to the whim of the Commission or its staff." If I thought that were true, I would be as concerned as he is—but it isn't. I do controvert his contention "that the purpose of the present revision is to exempt from the rules commentary of the kind contained in the CBS
386 Exhibit" if, as seems to be the case, he uses the word "kind" to refer to the character or quality of such commentary. While I greatly admire Eric Sevareid, this is no "Sevareid rule". Mr. Sevareid's commentary will be exempt from the rule only so long as it is contained within a bona fide newscast, a bona fide news interview, or on-the-spot coverage of a bona fide news event.

Thus there will be no difficulty in identifying editorials—they are the broadcast expression of a licensee's opinion, usually identified as such. I am sure Mr. Sevareid quite clearly understands that he is not expressing the official opinions of CBS. As for commentary, it will be classified not according to the identity of the commentator or the

Commission's agreement or disagreement with his views, but according to the nature of the program in which it is presented. The Commission will have no "untrammelled power" and commentators and licensees will have no such difficulties as Commissioner Loevinger envisions.

On page 8, Commissioner Loevinger contends that the present rule imposes a great burden on freedom of speech because "even a fair, factual and temperate statement that reflects adversely on a group or individual constitutes an 'attack' under the present rules." First, the present rules makes no change in this respect from our long established policy going back many years. Commissioner Loevinger voted for the July 26, 1963 Public Notice which referred to the present attack principle in precisely the terms now in the rule.[8] Further, the concept of a personal attack is appropriately delineated. The rule does not come into play merely because a statement is made adversely reflecting on a group or individual. There must be a personal attack which makes the integrity, honesty, character or like personal qualities of the person or group an issue in the discussion of some controversial issue of public importance. Contrary to Commissioner Loevinger's suggestion, almost all of the examples set out in the CBS Exhibit are not personal attacks under the rule and do not raise any significant question in that respect. The Commission thus has been at pains to state that there can be vigorous disagreement with someone's views without bringing into play the personal attack rules. Indeed, I believe the *Pennsylvania Community Antenna Television* case, 1 FCC 2d 1610, cited in our first opinion, constitutes

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[8] FCC 63-734. See also letter to John H. Norris, (Red Lion Broadcasting Co.), 1 FCC 2d 1587; Letter to Allen Woodall (Radio Albany, Inc.) FCC 65-50; Letter to Warren Zwicky (Storer Broadcasting Co.), January 31, 1968, FCC 68-120. In all these rulings Commissioner Loevinger joined in finding a violation of the personal attack principle stated in exactly the same terms as here.

387 the short answer to Commissioner Loevinger on this score. Finally, Commissioner Loevinger is simply wrong in his assertion that if the broadcaster "guesses wrong" on the various facets, he will be fined. This is contrary both to our consistent statements and actions. See Letter to Roy Barthold (Station KUHT), January 31, 1968, FCC 68-121; Letter to L. E. White, Jr., January 31, 1968, FCC 68-122; Par. 9, Memorandum Opinion and Order, July 5, 1967, 8 FCC 2d 724.

Commissioner Loevinger's fourth reason for dissenting is that the revised rule "give[s] the Commission greater power to influence or control the expression of ideas than should be given to any Government agency." But this depends, of course, on his earlier conclusions that the rule is unconstitutionally vague and will subject broadcast expression of views entirely to the whim of the Commission. As indicated above, I think both of these are clearly erroneous.

While Commissioner Loevinger says that he still thinks the "right of reply" is a just principle if embodied in a clear and practical statement, he indicates that he has come "increasingly to doubt the ability of the Commission either to formulate a clear and practical statement of the principle or to administer such a principle wisely and justly." As indicated before, he has not sought to help us formulate such a statement of the principle.

On page 9, he cites two recent Commission actions as indicating serious doubt as to the wisdom and justice of our administration of the Fairness Doctrine. The first, our cigarette advertising rulings, need no special defense from me. Indeed, Commissioner Loevinger joined in both actions—without comment as to our letter of June 2, 1967 to WCBS-TV, and with a concurring statement attached to our Memorandum Opinion and Order of September 8, 1967, in which he seems to say that he doubts the legality

of our action but nonetheless concurs in it. The second, the *KING* cases, far from supporting Commissioner Loevinger, demonstrate the wisdom of our rules. In the first *KING* case, the station presented a series of 30 20-second editorials endorsing five candidates for office and offered each disadvantaged candidate 2 one-minute periods for reply. I have, of course, no quarrel with its right to editorialize in this way. But the station's offer to a rival candidate of only 2 one-minute spots, while it involved a reasonable total time (120 seconds), was clearly unreasonable in its disregard of the significance of the number of repetitions. The second *KING* case was similar in principle, again demonstrating that the public—and certainly the candidate involved—benefited from the application of our rule to require fair exposure of the responses to the station's numerous editorials.

On page 10, Commissioner Loevinger refers to our action in the *Brandywine Main Line* case, where we refused to suspend the hearing pending issuance of this revision of the personal attack rule. But there were several other issues in the case beyond any personal attack issues, and, as to the latter, only a narrow rule revision was contemplated which did not appear to affect the hearing in
that case. See Commissioner Johnson's concurring
388 statement in connection with that ruling. In fact,
our revision is of a narrow nature which cannot affect that case. Again, therefore, I believe that the Commission acted reasonably. Certainly we have not changed the underlying personal attack principle which applies in that case.

Finally, Commissioner Loevinger states, page 10, that he "will not hesitate to resolve every doubt in favor of maintaining the First Amendment freedoms." I fully agree with that purpose. Indeed, the basis of our present revision of the rule is a desire to avoid *any* possibility of

inhibiting robust, wide-open debate over the air. But my difference with Commissioner Loevinger is that, unlike him, I strongly believe that the Fairness Doctrine, including the personal attack facet, promotes the First Amendment freedoms, rather than restricting them. And I think his abandonment of any effort to maintain fairness in broadcast treatment of controversial issues simply because "arguable conflict" between the First Amendment and our regulatory action is urged by partisan interests leaves the public without needed protection. We are not creating or extending our own power—we could not if we wished to do so. We are simply pursuing policies developed over the years which contribute significantly to the democratic dialogue.

Joint Petition to Review

[Filed July 27, 1967]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16369

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
BEDFORD BROADCASTING CORPORATION
CENTRAL BROADCASTING CORPORATION
THE EVENING NEWS ASSOCIATION
MARION RADIO CORPORATION
RKO GENERAL, INC.
ROYAL STREET CORPORATION
ROYWOOD CORPORATION
TIME-LIFE BROADCAST, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

Joint Petition To Review an Order of the Federal Communications Commission

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

Petitioners present this joint petition for review of a final order of the Federal Communications Commission, FCC 67-795, released July 10, 1967, and in support thereof state as follows:

1. This petition is filed pursuant to 28 U.S.C. §§ 2341 *et seq.* (1966); Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); and 5 U.S.C. §§ 702-704 (1966).

NATURE OF THE PROCEEDINGS

2. The Federal Communications Commission (hereinafter Commission) has asserted for a number of years its so-called "fairness doctrine" as an obligation of broadcast station licensees in their programming with regard to controversial public issues. Although its terms have been varied considerably at different times, the fairness doctrine requires in substance that whenever a radio or television station broadcasts a program discussing a controversial issue of public importance it must provide a reasonable amount of broadcast time for the presentation of conflicting views. The fairness doctrine has been the subject of policy statements and individual rulings by the Commission.

3. On April 6, 1966, the Commission issued a Notice of Proposed Rule Making (FCC 66-291) in which it proposed for the first time to codify in a regulation two phases of its fairness doctrine. A station which violates a Commission regulation becomes subject to revocation or nonrenewal of its station license, issuance of a cease-and-desist order and civil forfeitures (47 U.S.C. §§ 312, 502). The proposed regulation set forth detailed requirements concerning the obligations of station licensees (a) where the station has broadcast an editorial endorsing or opposing a political candidate and (b) in cases where a "personal attack" upon a group or individual has occurred during a broadcast relating to a controversial public issue. In cases of editorial endorsement of political candidates, a broadcast station would be required to give notice within 24 hours (or advance notice if the editorial is broadcast within 72 hours of election day) to other candidates for the same office, to provide such candidates with a script or tape of the editorial, and to offer broadcast time over the station's facilities for a response by spokesmen for such candidates. In "personal attack" cases, similar notice

and opportunity to respond would have to be afforded the group or person attacked.

4. Written comments in response to the Commission's Notice of Proposed Rule Making were filed by numerous organizations and groups, including these petitioners. In their detailed comments, petitioners contended, *inter alia*, that the proposed regulation (and the fairness doctrine of which it is a part) restricted the free conduct of journalistic functions by broadcasters in violation of the freedom of the press guaranteed by the First Amendment. Petitioners pointed out that in the context of journalistic media other than broadcasting a "fairness" requirement would clearly violate the First Amendment and that no valid basis exists for distinguishing between broadcasting and other media. Petitioners submitted evidence to show that the effect of the fairness doctrine is to restrict the presentation of programs concerning controversial public issues and to reduce the amount of such programming.

5. On July 10, 1967, the Commission released a Memorandum Opinion and Order (FCC 67-795) adopting, effective August 14, 1967, the proposed regulation. The Commission, among other things, rejected petitioners' constitutional contentions. (A copy of the Commission's Memorandum Opinion and Order is attached as Exhibit A hereto.)

FACTS UPON WHICH VENUE IS BASED

6. Petitioner Radio Television News Directors Association (hereinafter RTNDA) is an unincorporated association of more than 1,000 news directors, news executives and other news personnel employed by radio and television stations or networks in the United States and Canada. It is authorized to represent its members in matters relating to the improvement of radio-television news services and freedom of information. RTNDA has its principal

office in Chicago, Illinois. The other petitioners are eight corporations which are licensees of radio and television stations located throughout the United States. Among the corporate petitioners, Bedford Broadcasting Corporation has its principle office in Bedford, Indiana; Central Broadcasting Corporation in Richmond, Indiana; and Marion Radio Corporation in Marion, Indiana.

7. Petitioners are "aggrieved" and "adversely affected" by the Commission's Order (FCC 67-795), within the meaning of 28 U.S.C. § 2344 and 5 U.S.C. § 702. The members of RTNDA will be hampered and restricted in the performance of their professional duties by reason of the regulation which is adopted by the Commission's Order. The other petitioners, as station licensees, are hampered and restricted by the instant regulation in their presentation of programs concerning controversial public issues and editorials endorsing or opposing political candidates. The regulation denies to each of the petitioners the freedom of speech and of the press guaranteed by the First Amendment. Unless the Commission's order is judicially reviewed at this time, petitioners will be compelled either to comply with a regulation which unconstitutionally interferes with their day-to-day performance of journalistic functions in the operation of radio and television stations, or, by failing to comply, to risk revocation or non-renewal of their station licenses, civil penalties, cease-and-desist orders, or (in the case of RTNDA members) loss of employment. Each petitioner was a party to the proceedings before the Commission.

GROUNDS UPON WHICH RELIEF IS SOUGHT

8. The Commission's order (FCC 67-795) and the regulation which it adopts are unlawful for each of the following reasons:

(a) The order and regulation violate the First Amendment to the U. S. Constitution.

(b) The order and regulation violate Section 326 of the Communications Act of 1934, 47 U.S.C. § 326, which prohibits program censorship by the Commission.

(c) The statutory provisions upon which the Commission relied in promulgating its order and regulation are unconstitutionally vague and imprecise as a basis for regulating conduct in the area of First Amendment rights.

(d) The Commission's regulation is itself too vague and imprecise to serve as a basis for regulating conduct in the area of First Amendment rights.

(e) The asserted statutory authorization for the Commission's regulation lacks the explicitness necessary to support agency action in an area of doubtful constitutionality.

RELIEF PRAYED

WHEREFORE, petitioners pray:

(1) that copies of this joint petition be served upon respondents and that the record upon which the Commission's final order here in question was entered be filed by the Commission in this Court, in accordance with 28 U.S.C. §§ 2344, 2346;

(2) that this Court review the Commission's order (FCC 67-795);

(3) that upon such review this Court set aside the Commission's order;

(4) that this Court declare invalid the Commission's regulation here in issue on the grounds that it is unconstitutional, unauthorized by law and violative of Section 326 of the Communications Act of 1934, 47 U.S.C. § 326; and

(5) that petitioners be granted such other relief as the Court may deem proper.

Respectfully submitted,

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Petition for Review

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 31560

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner*

v.

UNITED STATES OF AMERICA AND THE
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

Petition for Review of an Order of the Federal Communications Commission

Columbia Broadcasting System, Inc. (hereinafter Petitioner), by its attorneys presents this petition for judicial review of a final order of the Federal Communications Commission (hereinafter the Commission) and avers as follows:

I.

NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

1. Petitioner owns and operates, pursuant to license from the Federal Communications Commission, television station WCBS-TV and radio stations WCBS and WCBS-FM in New York City, as well as television and/or radio stations in Boston, Chicago, Los Angeles, Philadelphia, St. Louis and San Francisco. Radio and television stations owned and operated by Petitioner regularly carry news broadcasts and other programs involving discussion of issues of a controversial nature. Some of these stations also carry editorials endorsing candidates for political office. Petitioner also owns and operates a television network and a radio network, not licensed by the Commission, which furnish programs—including news and public affairs programs—daily to several hundred broadcast stations. Petitioner seeks review of an order of the Commission

entered in proceedings entitled "In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or Where a Station Editorializes as to Political Candidates" (Memorandum Opinion and Order No. FCC 67-795, Docket No. 16574, adopted July 5, 1967, and released July 10, 1967, attached hereto as Appendix A).

2. These proceedings were initiated on April 6, 1966, by the issuance of a Notice of Proposed Rule Making (FCC 66-291). The proposal included provisions purporting to codify the "personal attack" and "political editorial" branches of the Commission's "fairness" doctrine. Comments were filed by Petitioner and others in opposition to the proposed rule, while other parties favored its adoption.

3. The proposed rule was attacked on various grounds: as an unconstitutional restraint on free speech, as beyond the Commission's statutory authority, and as contrary to the public interest and general regulatory policies of the Commission. In the Memorandum Opinion and Order under review the Commission rejected the objections of Petitioner and others, and adopted the Rule in substantially the form proposed in the Notice of Proposed Rule Making. Commissioner Loevinger concurred in a separate opinion, and Commissioner Bartley dissented. Commissioner Wadsworth was absent. As authority for the adoption of the Rule, the Commission invoked Sections 4(i), 4(j), 303(r) and 315 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 315.

4. The order under review amends Part 73 of the Commission's Rules (47 C.F.R.) by adding four identical sections (§§ 73.123, 73.300, 73.598 and 73.679) applying respectively to standard broadcast stations, FM broadcast stations, noncommercial educational FM broadcast stations, and television broadcast stations. Subsection (a) of the Rule provides that when, "during the presentation of

views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group," the licensee must within a week notify such person or group of the broadcast, furnish a script, tape or accurate summary of the "attack," and offer such person or group "a reasonable opportunity to respond over the licensee's facilities." Subsection (b) exempts from the requirements of subsection (a) attacks on "foreign groups or foreign public figures" and attacks made by candidates and their spokesmen and associates on other candidates or their spokesmen or associates. Apart from the exemptions subsection (a) of the Rule applies to any statement, comment or remark constituting a "personal attack" broadcast over a station's facilities, whatever the source. The subsection applies to statements made in the course of a news program or actual live coverage of a news event, or in a discussion program or documentary. It applies whether the statement is truthful or untruthful, whether the broadcaster acted with "malice", and whether the program presented fairly or unfairly the controversial issue and the facts on which the "attack" is based. While the Commission has conceded that "there may be uncertainty or legitimate dispute concerning some aspects of the personal attack principle" and that "the Rules are not designed to answer such questions," the Commission has invited licensees to "consult" it for "interpretation of our rules and policies" (Appendix A, page 6).

5. Subsection (c) of the Rule requires that when "a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial" a script or tape together with an offer of "a reasonable opportunity for a candidate or a spokesman of the

candidate to respond over the licensee's facilities." Where the editorial is broadcast within 72 hours prior to the day of election, moreover, "the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion."

6. In the Order under review, the Commission for the first time has prescribed by rule specific procedures which must be followed in given situations in order to comply with the "fairness" doctrine. This Rule may be enforced through imposition of criminal penalties or forfeitures under Sections 502 and 503(b) of the Act, 47 U.S.C. §§ 502 and 503(b), as well as through license revocation and renewal proceedings under Sections 307 and 312 of the Act, 47 U.S.C. §§ 307 and 312.

II.

Statement of Venue and Jurisdiction

7. Petitioner is incorporated in the State of New York and has its principal place of business in New York City. Venue in this Court is thus appropriate under Section 3 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343. Since the order involved is a final order of the Federal Communications Commission, this Court has jurisdiction over the subject matter of this petition under Section 2 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2342; Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); and Section 10(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 704.

8. As appears from paragraph 2 of the Commission's Memorandum Opinion and Order (Appendix A, page 1), Petitioner was a party to the proceedings leading to the Order under review, and filed comments in opposition to the proposed rule. Petitioner is a "party aggrieved" by

reason of the Commission's Order within the meaning of Section 4 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343, and is further a "person suffering legal wrong" and a "person . . . adversely affected or aggrieved" by reason of the Commission's Order within the meaning of Section 10(a) of the Administrative Procedure Act, as amended, 5 U.S.C. § 702, as more fully set forth in paragraphs 9-11 hereof.

III.

Effects of the Rule

9. The right of reply established by the Rule would disserve rather than promote the public interest in accurate and balanced presentation of information and opinion with respect to controversial issues. For example there are situations in which the "personal attack" appears in the course of a discussion of a controversial issue of public importance, but in which the "personal attack" is merely peripheral to the public issue. Moreover, Petitioner and other licensees present many programs in which both sides of a controversial issue, including the position of persons or groups "personally attacked," are fully and fairly presented. In such cases a right of personal reply is not required to promote the public interest in an accurate report, and, if the reply is one-sided, will indeed tend to mislead the public. To attempt to correct the imbalance by a response to the reply would be likely to produce a repetition of the original "personal attack," thus creating an obligation to invite a further reply, and so on ad infinitum. A similar proliferation would occur if the reply contained a "personal attack" upon a second individual or group, since the Rule would then impose a duty to invite a rejoinder from still another quarter.

10. Subsection (a) of the Rule would inhibit free and vigorous expression and debate on controversial issues of public importance. The presentation of news, documentary

and discussion broadcasts, in which there is a vital public interest, would often be rendered impracticable if an individual or group upon whom a "personal attack" was made had to be accorded a right of reply as required by the Commission's Rule. To the extent that "personal attacks" may be claimed to be defamatory, compliance with the notification requirements of the Rule may also jeopardize defenses to a subsequent defamation suit.

11. Subsection (c) of the Rule would condition the right of broadcast licensees to present an editorial endorsement or disapproval of candidates for public office by according a right of reply to unfavored candidates. This new requirement would inhibit editorial endorsements.

IV.

Grounds on Which Relief is Sought

12. The grounds relied upon as the basis for relief are as follows:

(a) The Commission has exceeded its powers under the Communications Act in promulgating the Rule. Sections 4(i), 4(j) and 303(r) of the Act are merely authorizations to take action, by rule making and otherwise, to implement powers granted elsewhere in the statute. Section 315 is limited to a highly specific "equal opportunities" provision for candidates and a general reference to the "fairness" doctrine which does not confer any powers on the Commission. Congress has refused to provide a general federal broadcast libel remedy or even to broaden the narrowly limited statutory right of political candidates to reply to one another; Congress did not intend to empower the Commission to create a new private remedy for "personal attacks."

(b) By imposing a specific requirement that in certain circumstances a particular program (i.e. the reply of a particular individual) must be carried, the

Rule amounts to program censorship by the Commission in violation of Section 326 of the Communications Act, as amended, 47 U.S.C. § 326, prohibiting the Commission from exercising the power of censorship.

(c) Subsection (a) of the Rule would induce licensees to delete material they desire to bradcast for the sole purpose of eliminating possible "personal attacks" and thus reduce the burdens of complying with the Rule. The Rule is therefore contrary to the principles of free debate and discussion and to the spirit of the Act. *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959).

(d) The Rule violates the provision of Section 326 of the Communications Act that "no regulation . . . shall be promulgated or fixed by the Commission which shall interfere with the right of free speech. . . ." Moreover, it cannot be presumed that Congress in enacting the Communications Act intended to empower the Commission to issue rules raising substantial questions of interference with fundamental First Amendment rights. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *Greene* v. *McElroy*, 360 U.S. 474 (1959).

(e) Whatever the intent of Congress, the Rule would abridge free expression, discussion and debate in violation of the First Amendment. *New York Times, Inc.* v. *Sullivan*, 376 U.S. 254 (1964); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Mills* v. *Alabama*, 384 U.S. 264 (1966).

(f) Even if regulation of the subject matter by rule were held to be within the Commission's power, the adoption of the Rule would be an abuse of discretion. Without achieving any public interest goal of comparable importance, it would inhibit the dissemination

of news, discussion of controversial public issues, and expression of editorial opinion, functions of communications media that are vital to the political health of a free society.

V.

Relief Prayed For

14. Wherefore, Petitioner respectfully prays that upon final hearing and review this Court will, by appropriate order, judgment or decree:

(a) Set aside and determine unlawful and without force and effect the Order of the Commission adopted July 5, 1967 in Docket No. 16574, and Sections 73.123, 73.300, 73.598 and 73.679 of the Commission's Rules, adopted by said Order; and

(b) Grant such other or further relief as it determines to be just and necessary.

July 27, 1967.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16369

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION
BEDFORD BROADCASTING CORPORATION
CENTRAL BROADCASTING CORPORATION
THE EVENING NEWS ASSOCIATION
MARION RADIO CORPORATION
RKO GENERAL, INC.
ROYAL STREET CORPORATION
ROYWOOD CORPORATION
TIME-LIFE BROADCAST, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

Supplement to Joint Petition to Review an Order of the Federal Communications Commission

Petitioners present this supplement to their joint petition for review of an order of the Federal Communications Commission, filed July 27, 1967, and state as follows:

1. On July 27, 1967, petitioners filed in this Court their joint petition to review a final order of the Federal Communications Commission, FCC 67-795, Docket No. 16574, adopted July 5, 1967, released July 10, 1967. As set forth in the joint petition, the order in question adopted a regulation (47 CFR §§ 73.123, 73.300, 73.598, 73.679) imposing certain obligations on radio and television station licensees in cases (a) where a station has broadcast an editorial

endorsing or opposing a political candidate and (b) where a "personal attack" upon a group or individual has occurred during a broadcast relating to a controversial public issue.

2. On August 2, 1967, the Federal Communications Commission adopted a further order, FCC 67-923, Docket No. 16574, released August 7, 1967, which, for purposes of clarification, amended the aforementioned regulation to state that the requirements concerning "personal attacks" are not applicable to bona fide newscasts or on the spot coverage of bona fide news events by station licensees. (A copy of this Memorandum Opinion and Order is attached as Exhibit A hereto.)

3. The Commission's action in amending its regulation by way of clarification does not affect the grounds for review stated in the pending joint petition, the standing of these petitioners, or the jurisdiction of this Court with respect to the joint petition.

Respectfully submitted,

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Supplement to Petition for Review

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 31560

COLUMBIA BROADCASTING SYSTEM, INC., *Petitioner*

v.

UNITED STATES OF AMERICA AND THE
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*

Supplement to Petition for Review of an Order of the Federal Communications Commission

Columbia Broadcasting System, Inc. (hereinafter Petitioner) by its attorneys presents this supplement to its petition for judicial review of an order of the Federal Communications Commission (hereinafter the Commission), filed July 27, 1967, and avers as follows:

1. The Commission adopted on August 2, 1967, and released on August 7, 1967, a Memorandum Opinion and Order (No. FCC 67-923) amending the Rule adopted in the Order under review. A copy of the Memorandum Opinion and Order is attached hereto as Appendix A.

2. The amendment exempts from the requirements of Subsection (a) of the Rule (dealing with "personal attacks") "bona fide newscasts or on-the-spot coverage of a bona fide news event." The "personal attack" provision of Subsection (a) still applies, however, to news documentaries and news interview programs, as well as to "editorial or similar commentary" included in newscasts or on-the-spot coverage of news events. For example, statements made on a news interview program such as "Face The Nation," even though they are of sufficient news magnitude to make the first page of Monday morning newspapers throughout the country, would appear to be covered

by the Rule, although a newscast reporting that the identical statements had been made on "Face The Nation" would appear to be exempt.

3. The amended Rule fails to remedy many of the defects present in the original version. Indeed the Commission, in adopting the amendment, specifically recognized the inhibitory effect of the original Rule on news programs and for that reason exempted "bona fide newscasts or on-the-spot coverage of a bona fide news event." Nevertheless, the Commission has retained the Rule in full force and effect as to news documentaries and news interview programs. Nothing in the amendment makes the Rule any less inhibitory or objectionable with respect to such programs.

4. As amended, the Rule has become even more uncertain in its application. Not only must licensees decide whether a statement constitutes a "personal attack" or occurs "during the presentation of views on a controversial issue of public importance"; they must also make judgments as to whether, if the program involved is a "bona fide newscast or on-the-spot coverage of a bona fide news event," so as to be generally exempt from the Rule, the attack nonetheless is of such a nature (e.g., "editorial or similar commentary") so as to bring it back within the scope of the Rule. There is no indication in the Commission Memorandum Opinion and Order, moreover, whether interviews and documentary-type material broadcast in the course of newscasts and on-the-spot coverage of news events are, like editorials and commentary broadcast in such programs, still subject to the Rule. Uncertainty on these points, and the impracticability of obtaining timely advisory pre-broadcast rulings with respect to such a perishable commodity as news, will inevitably lead to licensee decisions to refrain from broadcasting news-related material and programs that are arguably subject

to the Rule. And to the extent the Commission receives and acts upon post-broadcast requests for advisory interpretations and waivers of the Rule, it will become increasingly involved in making editorial judgments heretofore the responsibility of the broadcaster.

5. While the grounds for relief stated in the Petition for Review continue to apply to the Rule as amended, the effects of the amendment require amplification of the grounds for relief as follows:

(a) The uncertainty as to what portions of generally exempted programs are still subject to the amended "personal attack" provision renders the Rule unconstitutionally vague.

(b) Continual supervision by the Commission of editorial judgments of broadcasters, through orders directing that licensees permit replies to "personal attacks," violates Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, and abridges freedom of the press in violation of the First Amendment.

(c) Because there is no rational basis, in terms of the public interest, for the Commission's distinction between program material covered and program material exempted under the amended Rule, the adoption of the Rule is arbitrary, unreasonable, and an abuse of discretion.

6. WHEREFORE, Petitioner respectfully prays that upon final hearing and review this Court will, by appropriate order, judgment or decree:

(a) Set aside and determine unlawful and without force and effect the Order of the Commission adopted July 5, 1967 in Docket No. 16574, as amended by the Order of the Commission adopted August 2, 1967 in

said Docket, and Sections 73.123, 73.300, 73.598 and 73.679 of the Commission's Rules, as amended, adopted by said Orders; and

(b) Grant such other or further relief as it determines to be just and necessary.

September 1, 1967.

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Petition for Review

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL BROADCASTING COMPANY, INC., *Petitioner,*

v.

UNITED STATES OF AMERICA AND THE
FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*

Petition for Review of an Order of the Federal Communications Commission

National Broadcasting Company Inc. (hereinafter NBC), by its attorneys Cahill, Gordon, Sonnett, Reindel & Ohl, for its petition for review of a final order, as amended, of the Federal Communications Commission (hereinafter FCC), states as follows:

I

NATURE OF THE PROCEEDINGS AS TO WHICH REVIEW IS SOUGHT

1. NBC seeks review of an order, as amended, of the FCC entered in a proceeding entitled "In the Matter of Amendment of Part 73 of the Rules to Provide Procedures in the Event of a Personal Attack or where a Station Editorializes as to Political Candidates" (Memorandum Opinion and Order No. FCC 67-795, Docket No. 16574, adopted July 5, 1967 and released July 10, 1967, attached hereto as Appendix A, as amended by Memorandum Opinion and Order No. FCC 67-923, Docket No. 16574, adopted August 2, 1967 and released August 7, 1967, attached hereto as Appendix B).

2. These proceedings were initiated on April 6, 1966 by the issuance of a Notice of Proposed Rule Making (FCC 66-291). The proposed rule included provisions purporting to codify two recently developed aspects of the FCC's "fairness doctrine."

3. The proposed rule set forth detailed requirements concerning the obligations of station licensees (a) where the station has broadcast an editorial endorsing or opposing a political candidate and (b) in cases where a personal attack upon a group or individual has occurred during a broadcast relating to a controversial issue. In the case of editorial endorsement of political candidates a station would be required: (a) to give notice within 24 hours (or advance notice if the editorial is broadcasted within 72 hours of Election Day) to other candidates for the same office, (b) to provide such candidate with a script or tape of the editorial, and (c) to offer broadcast time over the station's facilities for a response by a spokesman for such candidate. In the case of a personal attack similar notice and opportunity to respond would have to be afforded the person or group under attack.

4. Written comments in response to the Commission's Notice of Proposed Rule Making were filed by numerous organizations and groups including NBC. The grounds upon which the proposed rule was attacked included arguments that the rule is: (a) an unconstitutional restraint on freedom of speech and press, (b) beyond the FCC's statutory authority, and (c) contrary to the public interest.

5. In its Memorandum Opinion and Order No. FCC 67-795, Docket No. 16574, adopted July 5, 1967, the FCC rejected the suggestions of NBC and others and adopted the rule in substantially the form proposed in the Notice of Proposed Rule Making. Commissioner Lovinger concurred in a separate opinion and Commissioner Bartley dissented; Commissioner Wadsworth was absent. As authority for the adoption of the rule the FCC invoked Sections 4(i), 4(j), 303 (r) and 315 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r) and 315.

6. In its Memorandum Opinion and Order No. FCC 67-923, Docket No. 16574, adopted August 2, 1967, the FCC

amended Memorandum Opinion and Order No. FCC 67-795 by withdrawing application of the personal attack aspects of the rule to a bona fide newscast or on the spot coverage of a bona fide news event. Commissioner Cox concurred in the result and Commissioners Bartley, Lovinger and Wadsworth were absent.

7. In the Order, as amended, under review the Commission for the first time has prescribed by rule specific procedures which must be followed in given situations in order to comply with the "fairness doctrine" and thus has afforded NBC an opportunity to question by judicial review whether the function of the press as envisioned by the FCC and imposed on its licensees by the FCC's application of its fairness doctrine is compatible with the function of the press protected by the First Amendment of the Constitution of the United States.

II

Facts On Which Jurisdiction and Venue Are Based

8. NBC is a corporation duly organized and existing under the laws of the State of Delaware and has its principal place of business in the City of New York, State of New York. Venue in this Court is therefore conferred by Section 3 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343.

9. Jurisdiction over the subject matter of this petition is conferred upon the Court by Section 2 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343; Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a); and Section 10(c) of the Administrative Procedure Act, as amended, 5 U.S.C. § 704, because the order involved is a final order of the Federal Communications Commission.

10. NBC owns and operates, pursuant to license from the FCC, television broadcast station WNBC-TV, standard

broadcast station WNBC and frequency modulation broadcast station WNBC-FM in New York City as well as a number of stations in other cities. These stations carry programs involving discussions of controversial issues of public importance. NBC also owns and operates a television network and a radio network not licensed by the FCC, which furnish programs, including programs involving discussions of controversial issues of public importance, to several hundred broadcasting stations.

11. To the extent the FCC's "fairness doctrine" in general and its application of the rules adopted under FCC Order No. 67-795 in particular conflict with NBC's own high standard of professional journalism's duty of responsible expression of views, NBC is being required to give up its right to be a part of the free press and is subject to the imposition of criminal penalties or foreitures under Sections 502 and 503(b) of the Act, 47 U.S.C. §§ 502 and 503(b) as well as license revocation and renewal proceedings under Sections 307 and 312 of the Act, 47 U.S.C. §§ 307 and 312. Broadcast stations carrying the programs of the NBC Television Network and the NBC Radio Network would also have to consider the effect of the Order and Rule in determining whether or not to accept a network program since they would be subject to the same criminal penalties, forfeitures or revocation and renewal proceedings. As a result the Order and Rule would also adversely affect NBC's network programming.

12. Petitioner is therefore a "party aggrieved" by reason of the FCC's order within the meaning of Section 4 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2343, and is further a "person suffering legal wrong" and a "person * * * adversely affected or aggrieved" by reason of the FCC's order within the meaning of Section 10(a) of the Administrative Procedure Act, as amended, 5 U.S.C. § 702.

III

Grounds On Which Relief Is Sought

13. The following grounds are relied upon as the basis for relief:

(a) The Order and Regulation, as amended, are an unconstitutional abridgment of freedom of the press and speech guaranteed in the First Amendment to the United States Constitution. Freedom of the press contemplates, not that the Government shall control and regulate the press with the stated objective of compelling the press to be freely available for the communication of the opinions and views of all, but that the press shall itself be free to publish what it chooses. The rule adopted by the FCC is a serious infringement on that freedom;

(b) The Order and Regulation, as amended, violate Section 326 of the Communications Act of 1934, 47 U.S.C. § 326, which prohibits censorship by the FCC;

(c) The asserted statutory authorization for the FCC's Order and Regulation, as amended, does not support such regulation, particularly in an area where important Constitutional Rights are involved, and violates the equal protection requirements and due process clause of the Fifth Amendment of the Constitution of the United States; and

(d) The adoption of the rule, even if it is authorized by the applicable statutes, is contrary to the public interest and an abuse of the Commission's discretion in that it inhibits the full dissemination and communication of news and information, and ideas, without promoting any significant public interest.

IV

Relief Prayed For

14. Wherefore, petitioner respectfully prays that this Court, by appropriate order, judgment or decree:

(a) Set aside Order No. FCC 67-795 adopted by the FCC on July 5, 1967 in Docket No. 16574, as amended, and Sections 73.123, 73.300, 73.598 and 73.679 of the FCC Rules, adopted by said order, as amended; and

(b) Grand such other and further relief as is just and necessary.

Dated: New York, New York
August 31, 1967

Cahill, Gorden, Sonnett,
Reindel & Ohl

By /s/ Lawrence J. McKay
A Member of the Firm

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PROCEEDINGS IN COURT OF APPEALS

MOTION OF PETITIONER FOR LEAVE TO FILE EXHIBIT

Petitioner Columbia Broadcasting System, Inc., by its attorneys, hereby moves this Court for leave to file with its brief in the above-captioned case a separately bound Exhibit. In support of this Motion, the attorneys for Petitioner state:

One of the important issues in this case is the legality of the Federal Communications Commission's "personal attack" rules. In connection with its argument as to the effect of the rules on Petitioner's public affairs programming, Petitioner has prepared an Exhibit setting forth excerpts from transcripts of programs that contain statements arguably covered by the rules. Petitioner believes this material is relevant and will be of assistance to this Court in its consideration of the case.

All parties in this case and the companion cases (Nos. 16,369 and 16,499), pending in this Court, have consented to the granting of this Motion. Respondents United States of America and the Federal Communications Commission, however, reserve the right to argue that the material contained in the Exhibit should not be considered by this Court.

NOVEMBER 21, 1967.

United States Court of Appeals for the Seventh Circuit
Chicago, Illinois 60604

Tuesday, November 21, 1967

No. 16498

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petition for Review of an Order from the Federal Communications Commission

Before Hon. LUTHER M. SWYGERT, *Circuit Judge.*

On consideration of the motion of counsel for petitioner,

It is ordered, That leave be granted to file a printed separately bound exhibit with its brief.

MOTION OF RESPONDENTS TO HOLD PETITIONS FOR REVIEW IN ABEYANCE

The United States of America and the Federal Communications Commission, respondents in the above-entitled consolidated cases, move that these cases be held in abeyance pending a decision by the Supreme Court in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, No. 600, Oct. Term, 1967, certiorari granted December 4, 1967. The grounds of this motion are as follows:

1. The petitions for review herein seek review of two Memorandum Opinions and Orders of the Federal Communications Commission in which the Commission codified in rule form the procedures it had previously enunciated as a general policy directive and in *ad hoc* situations, under which a broadcast licensee is required to afford time to reply to a person or group attacked over the station, and to a candidate for public office against whom the station has carried an editorial. The Commission adopted the rules to add precision to these requirements and to provide sanctions by way of forfeiture for violation of the policies in lieu of considering violations at renewal time. It emphasized that the substance of previously enunciated doctrine was not being altered. Memorandum Opinion and Order adopted July 5, 1967, Par. 3, 4 (Exhibit A to Joint Petition for Review of Radio Television News Directors Association, *et al.*)

2. The petitions for review challenge the constitutionality of and statutory support for the "personal attack" rules. In addition, petitioners National Broadcasting Company, Inc. and Radio Television News Directors Association, *et al.*, challenge the validity of the general fairness doctrine of the Commission, which requires fair treatment of opposing viewpoints on controversial issues of public importance. The personal attack policy forms one part of this doctrine.

3. Pursuant to a stipulation approved by this Court, the petitioners filed their briefs on November 21, 1967. The respondents are presently preparing their brief which is due on December 21, 1967. A motion for an extension of time on respondents' brief to January 22, 1968 is pending.

4. On December 4, 1967 the Supreme Court granted certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, 381 F. 2d 908. In that case, the District of Columbia Circuit sustained a Commission order requiring a broadcast station to provide free time to reply to a person whose character was attacked over the station. This order was issued under the personal attack policy prior to its codification in the rules here challenged. The issues presented on certiorari include the constitutionality of the personal attack policy and the general fairness doctrine, but not the requirements of the new rules on editorializing.

5. In view of the fact that the instant cases present the same fundamental issues of the constitutionality and statutory basis of the Commission's fairness doctrine and personal attack policy as does *Red Lion*, we believe that it would serve the ends of justice and avoid an unnecessary burden upon the judicial process to hold these cases in abeyance pending resolution of these basic issues by the Supreme Court. While the requirements of the rules on the right of candidates for office to reply to station editorials are not at issue before the Supreme Court, the parties will be better able to present their arguments on that question illuminated by a Supreme Court decision on the basic constitutional issues. Petitioners also, of course, may present their views on the constitutional and statutory issues to the Supreme Court as *amicus curiae*. We note in this connection that petitioners National Broadcasting Company, Inc. and Columbia Broadcasting System, Inc. filed briefs as *amicus curiae* in response to the *Red Lion* petition for certiorari in which they unsuccessfully urged the Supreme Court to defer that case pending a decision by this Court.

It is therefore respectfully requested that this Court hold these cases in abeyance pending a decision by the Supreme Court in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, No. 600, October Term, 1967.

DECEMBER 14, 1967.

ANSWER OF PETITIONERS TO MOTION TO HOLD CASES IN ABEYANCE

The petitioners in the above-entitled cases, Radio Television News Directors Association, et al., Columbia Broadcasting System, Inc., and National Broadcasting Company, Inc., hereby oppose respondents' Motion To Hold Petitions for Review in Abeyance. Petitioners suggest instead that the filing date for respondents' brief be postponed (and all other procedural dates postponed accordingly) to a date thirty (30) days after such action as the Supreme Court may take upon a petition for a writ of certiorari before judgment which petitioners intend shortly to file.[1]

In support whereof, petitioners state as follows:

I

In their motion filed on or about December 18, 1967, respondents request this Court to hold the instant cases in abeyance pending a decision by the Supreme Court in *Red Lion Broadcasting Co.* v. *FCC*, No. 600. The respondents say that, since these cases present "the same fundamental issues of the constitutionality and statutory basis of the Commission's fairness doctrine and personal attack policy as does *Red Lion*," the instant cases should be held in abeyance until the Supreme Court has decided *Red Lion*.

Petitioners agree with respondents that the instant cases and *Red Lion* are closely related, although not necessarily dispositive of one another. But it does not follow that this Court should necessarily suspend all further procedural steps in these cases during what promises to be a very substantial period. There are important issues in these cases (e.g., the validity of the Commission's regulations governing political editorials) not present in *Red Lion*. Moreover, the policies and regulations at issue here are now effective and would continue in effect while the cases are held in abeyance. The Government's request for

[1] Petitioners' position herein makes it unnecessary for them to respond to respondents' Motion for Extension of Time in Which to File Respondents' Brief and Motion to Correct Motion for Extension of Time to File Briefs.

deferral until the Supreme Court finally acts in another case is unreasonable. Petitioners should not, we submit, be required to comply with burdensome requirements of questionable legality, or to risk serious penalties by noncompliance, throughout a prolonged and Government-initiated delay of proceedings for judicial review begun expeditiously by petitioners.

II

There is much to be said in favor of simultaneous consideration by the Supreme Court of the instant cases and *Red Lion*. The instant cases present the constitutional and statutory issues in the context of agency regulations of general applicability, while *Red Lion* presents only a very limited application of a doctrine which has a multiplicity of adverse effects upon public debate. In briefs *amicus curiae* filed in support of Red Lion's petition for a writ of certiorari, petitioners CBS and NBC suggested that the Supreme Court might wish to defer action on the Red Lion petition until the present cases had ripened for Supreme Court review. The Supreme Court did not defer action but granted the writ and set *Red Lion* for argument in ordinary course. Since this decision may have rested not on a rejection of the suggestion that the two cases be heard together but on the belief that review of *Red Lion* should not be delayed, petitioners have decided to seek a writ of certiorari before judgment in order to provide the Supreme Court with the opportunity, should it so desire, to review the two cases simultaneously as well as expeditiously.[2]

Accordingly, petitioners oppose respondents' motion and suggest that the date for filing respondents' brief be postponed until thirty days after the Supreme Court grants or denies the petition for a writ of certiorari before judgment to be filed by petitioners and that all other procedural steps be adjusted accordingly.

DECEMBER 29, 1967.

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[2] Since the constitutional power of the Supreme Court to grant the writ before judgment on a petition to review an agency decision is a matter of first impression, petitioners will also suggest that, if their petition be denied, the Supreme Court may wish to note that denial is without prejudice to the filing of a motion for certification of questions by the Court of Appeals under 28 U.S.C. 1254(3). See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), as to the appropriateness of a certification under these circumstances.

In the United States Court of Appeals for the Seventh Circuit

January 2, 1968

Nos. 16,369, 16,498 and 16,499, consolidated

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, BEDFORD BROADCASTING CORPORATION, CENTRAL BROADCASTING CORPORATION, THE EVENING NEWS ASSOCIATION, MARION RADIO CORPORATION, RKO GENERAL, INC., ROYAL STREET CORPORATION, ROYWOOD CORPORATION, TIME-LIFE BROADCAST, INC., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petitions To Review Orders of the Federal Communications Commission

Before Hon. LATHAM CASTLE, *Circuit Judge.*

On consideration of the motion of respondents in the above consolidated matters to correct their motion of December 14, 1967, and that the time for the filing of the petitioners' reply briefs be extended to February 13, 1968, and the time for the filing of a joint appendix be fixed as February 27, 1968; the additional motion of the respondents that these consolidated cases be held in abeyance by this Court pending a decision by the Supreme Court of the United States in *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission.* No.

600, Oct. Term, 1967, certiorari granted December 4, 1967 (decision below reported at 381 F. 2d 908); and the answer of the petitioners to said motions and counter-suggestion thereto:

It is ordered that the time for the filing of respondents' brief in the above consolidated cases be and is hereby extended for a period of 30 days after the Supreme Court of the United States has ruled on a petition for a writ of certiorari before judgment to be filed by petitioners, that petitioners' reply briefs be filed within 15 days after the filing of respondents' brief, and that the joint appendix be filed within 15 days after the filing of said reply briefs; provided, however, that such a petition for certiorari is filed within 30 days hereof; otherwise, the above schedule of filings shall be computed from February 2, 1968.

MOTION FOR EXTENSION OF TIME IN WHICH TO FILE RESPONDENTS' BRIEF

The United States of America and the Federal Communications Commission, respondents in the above-entitled cases, hereby move this Court for an Order extending the time within which respondents may file their brief from February 28, 1968 to March 4, 1968. The grounds for this Motion are as follows:

1. On January 2, 1968, this Court "ordered that the time for the filing of respondents' brief * * * is hereby extended for a period of 30 days after the Supreme Court of the United States has ruled on a petition for a writ of certiorari before judgment to be filed by petitioners." The Supreme Court having denied that petition on January 29, 1968, respondents are presently scheduled to file their brief by February 28, 1968. Under the terms of the Order of this Court of January 2, 1968, petitioners' reply briefs are to be filed within 15 days after the filing of respondents' brief and the joint appendix is to be filed within 15 days after the filing of the reply briefs.

2. It is now apparent that, in order to insure proper response to the issues raised by petitioners' briefs in this very important case, further consideration and consultation between counsel for the Commission and the Department of Justice will be necessary. It is for these purposes, and to allow sufficient time for printing, that this extension is requested. We understand that the time for filing reply briefs and the joint appendix remains contingent on the date respondents' brief is filed and will be extended accordingly if the Court grants this Motion.

3. Counsel for all petitioners have authorized us to advise the Court that they do not object to the granting of this Motion.

Wherefore, respondents respectfully request this Court to grant the extension of time requested.

FEBRUARY 23, 1968.

United States Court of Appeals for the Seventh Circuit
Chicago, Illinois 60604

Tuesday, February 27, 1968

No. 16369–16498–9

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
RESPONDENTS

Petition for Review of an Order From the Federal Communications Commission

Before Hon. LUTHER M. SWYGERT, *Circuit Judge.*

On consideration of the motion of counsel for respondents,

It is ordered, That the time for filing respondents' brief be extended to March 4, 1968.

MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

The United States of America and the Federal Communications Commission, respondents in the above-entitled cases, hereby move that these cases be held in abeyance and that the Federal Communications Commission be authorized to conduct further rule making proceedings. The ground of this motion is that the Commission, upon further consideration and consultation with the Department of Justice, has determined, Commissioner Bartley abstaining and Commissioner Loevinger dissenting, to set aside those parts of the rules at issue dealing with personal attacks (subparts (a) and (b)), and to conduct an expeditious rule making proceeding looking toward their revision.

It is therefore respectfully requested that the cases be held in abeyance and that the Commission be authorized to conduct further proceedings upon an expedited basis for the purpose of reconsidering subparts (a) and (b) of the rules.

MARCH 1, 1968.

RESPONSE OF PETITIONER, COLUMBIA BROADCASTING SYSTEM, INC., TO MOTION OF RESPONDENTS TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

In a motion dated March 1, 1968, the Federal Communications Commission (the "Commission") and the United States of America, respondents herein, have moved that these cases be held in abeyance. Respondents advise that the Commission has determined to set aside subsections (a) and (b) of the rules under review, and respondents request that the Commission be authorized thereupon to conduct further rule making proceedings looking toward their revision. Petitioner Columbia Broadcasting System, Inc. ("CBS") has no objection to the grant of this motion provided that it is made clear that, pending disposition of the present cases, the Commission may not impose or enforce "personal attack" reply requirements, whether in the form of rules or informal policies, without further order of this Court.

In support whereof petitioner CBS shows as follows:

1. The rules under review, which purport to "codify" and "make more precise" the Commission's earlier informal personal attack policy,[1] were initially adopted by the Commission on July 5, 1967 (and were amended on August 2, 1967). Petitions for review were filed by the Radio Television News Directors Association, *et al.* ("RTNDA"), and CBS on July 27, 1967, and by National Broadcasting Company, Inc. on August 31, 1967. (Supplemental petitions for review were filed by RTNDA and by CBS to take account of the issues raised by the Commission's August 2, 1967, amendment to the rules.) Petitioners' briefs were filed on November 21, 1967. Respondents' brief was initially due on December 21, 1967, but since that time respondents have been granted three extensions of time for filing and their brief has not yet been filed.

2. It is beyond dispute that the constitutional and statutory issues presented in these cases are substantial. The Supreme Court has recognized their substantiality both by granting certiorari in the *Red Lion* case (*Red Lion Broadcasting Co.* v. *FCC*, 381 F. 2d 908 (D.C. Cir.), *cert. granted*, 389 U.S. 968

[1] See July 5, 1967, Memorandum Opinion and Order ¶¶ 3, 6, R. 347, 349.

(1967) (No. 600, this Term)) and by staying further proceedings in that case pending disposition by this Court of the present cases (88 Sup. Ct. 848). The United States and the Commission appear to recognize that substantial questions have been raised concerning the validity of the rules. See the attached dissenting statement of Commissioner Loevinger (Appendix A) and the concurring statement of Commissioner Cox (Appendix B) in connection with the Commission's decision to file the present motion; see also the attached letter dated February 29, 1968, from Assistant Attorney General Donald F. Turner to the Chairman of the Commission (Appendix C).

3. The Commission, beset with doubts concerning the validity of its "personal attack" rules, is now embarking upon a process of reconsideration. Whether or not the statutory and constitutional infirmities of the rules can in fact be eliminated by the "revision" of the rules contemplated by the Commission, petitioner CBS believes that the proposed rule making proceedings will occasion a thorough reconsideration of the rules and will thus be in the public interest. However, the Commission has given no assurance that it will await a determination by this Court of the present cases before putting any new "personal attack" rules or policies into effect. In view of the pendency of the present cases and the substantial delays in their disposition, and the serious inhibitions on free speech created by "personal attack" reply requirements, any new rules or policies in this area should not be placed into effect before being subjected to judicial scrutiny pursuant to the pending petitions for review and any amendments of the petitions resulting from the contemplated "revision." The Commission has not requested a remand of these cases but merely that they be held in abeyance, and the power of the Court to impose the requirement suggested in this response cannot be doubted.[2]

[2] See Section 9 of the Judicial Review Act of 1950, as amended, 28 U.S.C. § 2349; *WKAT, Inc.* v. *FCC*, 111 U.S. App. D.C. 253, 262, 296 F. 2d 375, 384, *cert. denied*, 368 U.S. 841 (1961); *United Air Lines, Inc.* v. *CAB*, 108 U.S. App. D.C. 220, 281 F. 2d 53 (1960); *WIRL Television Co.* v. *United States*, 107 U.S. App. D.C. 21, 274 F. 2d 83 (1959); *Sangamon Valley Television Corp.* v. *United States*, 106 U.S. App. D.C. 30, 269 F. 2d 221 (1959); *WORZ, Inc.* v. *FCC*, 106 U.S. App. D.C. 14, 268 F. 2d 889 (1959); *Massachusetts Bay Telecasters, Inc.* v. *FCC*, 104 U.S. App. D.C. 226, 261 F. 2d 55 (1959), *mandate enforced*, 20 Pike & Fischer, R.R. 2095 (1960). *Cf. Tuscarora Indian Nation* v. *FPC*, 105 U.S. App. D.C. 146, 151–52, 265 F. 2d 338, 343–44 (1958), *rev'd on other grounds*, 362 U.S. 99 (1960).

Wherefore, petitioner CBS has no objection to the grant of this motion provided that it is made clear that, pending disposition of the present cases, the Commission may not impose or enforce "personal attack" reply requirements, whether in the form of rules or informal policies, without further order of this Court.

MARCH 14, 1968.

APPENDIX A

DISSENTING STATEMENT OF COMMISSIONER LEE LOEVINGER

(Re motion to remand personal attack rules)

The issue of the existence and extent of Commission authority to supervise or regulate the content of broadcast programming has been disputed and debated for years, particularly with respect to the expression of opinions and the reporting of news. The issue has not been tested or decided in the courts, until current litigation, because licensees have generally deemed it more prudent not to hazard their licenses or antagonize the bureaucracy which had such great discretionary power over their business. However, the Commission and Commissioners have often stated that they invited litigation to test the legality of Commission action in this area. Ostensibly the Commission has sought and seeks the enlightenment and guidance of court decisions.

On July 5, 1967, the Commission promulgated certain rules relating to "personal attacks" and "political editorials". FCC 67–795. The stated purpose of these rules was to "clarify and make more precise the obligations of broadcast licensees" under the general "Fairness Doctrine" with respect to these matters, and to authorize the Commission to "impose appropriate forfeitures" in cases of violations of such obligations. Commissioner Bartley dissented. I concurred on the ground that "the right of reply" was a sound principle, but stated that the rules were not well drafted.

On August 2, 1967, the Commission sua sponte amended the personal attack rules, with Commissioners Bartley, Loevinger and Wadsworth absent, and Commissioner Cox concurring in the result. FCC 67–923. The stated ground of the amendment was the necessity of further "clarification".

In the meantime, Red Lion Broadcasting Co., appealed a ruling of the Commission under the general "Fairness Doctrine" to the Court of Appeals for the District of Columbia. The decision of that court, sustaining the constitutionality of the doctrine and the ruling of the Commission was entered June 13, 1967, *Red Lion Broadcasting Co.* v. *F.C.C.*, —— F. 2d —— (1967). Red Lion applied to the U.S. Supreme Court for certiorari and the Commission opposed. The Supreme Court granted the petition on December 4, 1967, and the case is now pending in that Court.

While the Red Lion case was on its way to the Supreme Court the Radio Television News Directors Association appealed the validity of the "personal attack" rules to the Court of Appeals for the Seventh Circuit. RTNDA petitioned the Supreme Court to grant certiorari before judgment in the Court of Appeals in order to consolidate both cases in the Supreme Court and bring several aspects of the legal issue before the Supreme Court for decision at one time. The Commission opposed this motion. On January 29, 1968, the Supreme Court denied the RTNDA petition to bring up the Seventh Circuit case immediately, but ordered the argument of the Red Lion case postponed until the RTNDA case had been decided by the Seventh Circuit and was ripe for Supreme Court review.

Now the Commission decides that it will petition the Seventh Circuit Court of Appeals to return the "personal attack" rules to the Commission for further revision and clarification. While the Commission has not decided what revision in the rules it will make, the general nature of the proposed revisions have been proposed to the Commission by its counsel. Though it is possible to express only tentative views on tentative proposals, it seems to me that the proposed revisions will involve no improvement in the rules but merely another step away from clarity and precision. In any event, this endless tinkering with the language of the rules cannot affect the governing legal principles and can amount to no more than an attempt to buttress legal arguments on the Commission's behalf. The inferences which the courts, the parties and the public are entitled to draw from the Commission's wavering course are obvious and justified.

But there is a more important consideration for me. At long last the Commission is in court with competent opposing counsel testing the existence and extent of Commission authority

to supervise and regulate speech by broadcast licensees and those using broadcasting facilities. The Commission is not true to its promise to litigate or to its avowed desire to secure authoritative decision of the issues when it opposes every attempt to bring these issues before the Supreme Court and then employs such tactics as the present ones, involving inevitable and indefinite delay and confusion of the issues.

The important issues here are not the cleverness, or unskillfulness, of Commission lawyers in drafting rules. Since these rules were issued, serious doubt has been cast on their constitutional validity by authoritative publications. See Harry Kalven, Jr., Broadcasting, Public Policy and the First Amendment, 10 J. Law & Econ. 15 (1967); Glen O. Robinson, The FCC and the First Amendment, 52 Minn. Law Rev. 67 (1967); Legislative History of the Fairness Doctrine, Staff Study for House Committee on Interstate and Foreign Commerce, 90th Cong. 2nd sess. (Feb. 1968). Regardless of any changes the Commission may now make in its rules, it will be apparent to the courts that sustaining the constitutional power of the Commission to act in this area will be to concede the power and invite the probability of adoption of rules at least as onerous as the ones now in effect. The Commission may now change its rules in an effort to make a better showing in pending litigation, but it cannot expunge the record of having adopted the rules now under attack. Neither Commission counsel nor the entire Commission can give the courts any assurance that the Commission will not adopt rules just like its present rules, or more burdensome, as soon as litigation is concluded if the courts find that the Commission has the power to act at all in this area. For the Commission to rewrite its rules now is obviously merely a cosmetic effort to present a better face in court. It is not complimentary to the courts to suggest that they will be influenced by this.

Certainly the basic legal issues raised in this litigation deserve the most prompt consideration and determination that adequate judicial process will permit. The action of the Commission will simply postpone indefinitely the determination of the issues. The course now being followed by the Commission in this matter serves only its own interest as a litigant, has no public purpose, and falls considerably short of the diligence, promptness and candor which the Commission demands of its own licensees. Consequently I am forced to dissent.

APPENDIX B

CONCURRING STATEMENT OF COMMISSIONER KENNETH A. COX

As is often the case, I find the opinion of Commissioner Loevinger in this matter a truly remarkable document. He imputes motives to those who disagree with him which simply do not exist.

It is true that the Commission has invited litigation to test the validity of our fairness doctrine, and I have done so personally. It is not accurate to say that we have not been true to our promise to litigate the issue, that we are considering changes in our rules for mere cosmetic effect, that we are serving only our own interest as a litigant and no public purpose at all, or that our action falls short of any standards of diligence, promptness and candor which we demand of our licensees—or which would generally be regarded as reasonable in a situation such as this.

Commissioner Loevinger is perfectly entitled to believe that we should not have taken this step—indeed I was initially of that view, though for entirely different reasons that he advances, but ultimately joined the rest of my colleagues in directing our General Counsel to move the Court of Appeals for the Seventh Circuit to hold the personal attack cases in abeyance and to authorize us to take further proceedings looking toward partial revision of the rules. However, I do not think he should be allowed to distort the record without challenge—particularly since the statements he now makes are not, for the most part, the ones he advanced while we were considering the matter.

The opposition filed by the Solicitor General to the petition of Red Lion Broadcasting Company for Supreme Court review of the decision of the Court of Appeals for the District of Columbia sustaining the Fairness Doctrine and our application of it to Red Lion was not designed to delay authoritative decision of this question. The Commission and the Solicitor General believed the Court of Appeals decision was sound and urged the Supreme Court that further review was not warranted. However, the Supreme Court decided to hear the case, and we welcome its review. The Solicitor General and the Commission have opposed delay in its resolution of the matter, and are ready to proceed as soon as possible.

Similarly, the Solicitor General's opposition to the petition of the Radio-Television News Directors Association asking the Supreme Court to grant certiorari in its case prior to decision by the Court of Appeals for the Seventh Circuit was not intended to delay resolution of the fundamental issues in this area. The Red Lion case was already before the Supreme Court and constituted an appropriate vehicle for deciding many of the basic questions concerning the Fairness Doctrine. The proposal of RTNDA to by-pass the Court of Appeals was unusual in the extreme and did not seem to us at all necessary, since the collateral question of the validity of the personal attack rules we have adopted to implement this portion of the Fairness Doctrine could be decided in ordinary course, quite apart from the Red Lion case. The Supreme Court apparently concluded that it would prefer to consider both aspects of the matter at one time, but wanted lower court decisions in each case. It therefore ordered argument in the Red Lion case postponed until the RTNDA case is before it in due course. If Commissioner Loevinger must assess blame for delay in concluding the pending litigation, I would suggest that he look in this direction—though I wish to make it clear that I have no objection to the course followed by RTNDA and think the Court's disposition of the matter is entirely appropriate and may conduce, in the long run, to the earliest practicable final decision of this important litigation. But, again, we and the Solicitor General were not seeking delay. Indeed, the course we urged would have produced a Supreme Court ruling on the basic constitutional challenge to the Fairness Doctrine and the personal attack principle more quickly than any other method proposed. I think Commissioner Loevinger's charges of intentional delay cast an unwarranted aspersion not only on the Commission but also the Solicitor General of the United States, who controls our litigation in the Supreme Court and filed the pleadings in question.

It is true that the step we are not taking—if the Court concurs—will involve delay in resolving the question of our authority to adopt rules dealing with the personal attack problem, though the issue of our basic policy in this area, out of which the rules evolved, is still before the Supreme Court in the Red Lion case. The latter case can either be adjudicated in the near future, or can be deferred until we have revised the rules and they can be challenged again if their new form

is still regarded as objectionable by the parties to the present case, or anyone else.

Certainly nothing we do by way of amendment of a portion of the rules will prevent any interested party from challenging our authority to act in this area, nor will the Supreme Court be asked "to concede the power and invited the probability of adoption of rules at least as onerous as the ones now in effect." It may hold the Red Lion case until a new challenge to our revised rules is before it, in which case it will know precisely what rules we would propose to apply in this area before it makes any ruling on the basic issues of the Fairness Doctrine and the personal attack principles—as distinguished from the rules—which we have developed in a series of decided cases. But even if it decides the Red Lion case in the near future, it will be ruling, as did the Court of Appeals, on the application of our policies to a specified factual situation fully disclosed on the record in that proceeding. If it were to affirm our action in Red Lion, that would not in any way commit it to affirmance of the rules we would be in the process of revising. Those could be challenged in advance of their application to anyone, just as was done with respect to the rules we are now asking permission to reconsider in part. There is no need for us to give the Courts any "assurance" as to the revised form of the rules we may adopt because the exact form of the revised rules will be before the Courts if and when they are asked to pass on our authority to make and enforce rules in this field.

We are not proposing to change our rules "to make a better showing in pending litigation" or "to present a better face in court." We are trying to adopt a *better rule* [1] for the regulation of this important aspect of broadcasting. If we are successful in formulating a rule which will promote what we conceive to be the public interest in the presentation of both sides of controversial issues—and which at the same time will avoid results which the parties fear would result from the present

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[1] Commissioner Loevinger is quite right in saying that we have not decided what revision of the rules we will make. He suggests, based on our preliminary discussions, "that the proposed revisions will involve no improvement in the rules but merely another step away from clarity and precision." Since we haven't adopted a new rule, I would simply invite him to bend his efforts toward avoiding the result he fears. He is free to make any suggestions he likes as to the language of the rule, although I don't recall any specific suggestions he made for revision of the present rule. He simply expressed the opinion that the rule "would better achieve its purpose [which he approved in principle] if it were drafted with a clearer delineation of scope and practical operation."

language of the rule and which they contend are legally or constitutionally invalid—that will certainly serve a *public* purpose, and not simply constitute a ploy in the maneuvering of counsel concerned only with victory or loss in court. If we have the authority and responsibility to act in this field, as we believe we do, then we should act as wisely and fairly as we can. If by revision of the language of the rule we can achieve what we consider to be valid goals without causing alleged impairment of the interests of the parties and the public in free broadcast journalism, then certainly we should be permitted to try to do so without being accused of lack of diligence and candor. This charge is all the more incomprehensible since we are acting, in part, at the urging of Assistant Attorney General Donald F. Turner, who formally represents the United States in these cases. (See his letter to Chairman Hyde dated February 29, 1968.)

We are not suggesting that the Courts will be "influenced" by this action. Instead, they will be asked to pass on our authority to adopt a revised rule which we have reason to believe will be more in the public interest than the one now on appeal. Certainly the Courts, the parties, and the public may scrutinize our entire course in this matter—indeed, they are asked to do so. If there are inferences to be drawn from what we have done I believe they should be far different from those Commissioner Loevinger suggests.

APPENDIX C

DEPARTMENT OF JUSTICE,
Washington, February 29, 1968.

Honorable ROSEL H. HYDE,
Chairman, Federal Communications Commission, Washington, D.C.

Re *Columbia Broadcasting System, Inc.* v. *U.S. & F.C.C.* (7th Circuit, No. 16498); *National Broadcasting Co.* v. *U.S. & F.C.C.* (7th Circuit, No. 16499); *Radio Television News Directors Assn.* v. *U.S. & F.C.C.* (7th Circuit, No. 16369).

DEAR MR. CHAIRMAN: In our consideration as a party respondent of the issues raised by petitioners in the above-entitled matters, we are fully prepared to support the Commission's position that the "fairness doctrine" is constitutional and

within the Commission's statutory powers, and that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine. However, we have some concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions in the rule without materially interfering with the public interest objectives that the rule is intended to serve. In discussions with members of your staff some possibilities along this line have been considered.

We therefore respectfully suggest that the Commission might wish to weigh the possibility of considering revisions of the rule before proceeding further with the cases now before the Seventh Circuit.

Sincerely yours,

DONALD F. TURNER,
Assistant Attorney General,
Antitrust Division.

ANSWER OF PETITIONERS RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL. TO MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

Petitioners Radio Television News Directors Association, *et al.*, in answer to respondents' Motion to Hold Cases in Abeyance and to Authorize Further Proceedings, oppose said Motion unless the Commission (a) sets aside pending further order of this Court not only the personal attack regulations but also the antecedent personal attack policy which was codified in the regulations, and (b) will complete its further proceedings within 90 days.

In support whereof, petitioners state:

I

Respondents' motion to hold these cases in abeyance while authorizing further proceedings[1] does not reveal which of two widely divergent courses the Commission is proposing to follow:

(1) The Commission may mean that it will set aside not only the formal regulations issued on July 5, 1967 (as amended August 2, 1967) but also the antecedent personal attack policy which was codified in the regulations—a policy that is substantively identical and which the Commission has been enforcing for a number of years—as illustrated by *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, now pending in the Supreme Court of the United States (No. 600, this Term).

(2) Alternatively, the Commission may mean that it will set aside the formal regulations but continue to enforce the same substantive policy as part of the so-called "fairness doctrine," as it has been doing since 1962.

If respondents are proposing the first course, we would have no objection so long as the Commission's further proceedings are in fact conducted expeditiously.

If respondents are proposing the second course, we oppose the motion as another tactical step in their strategy of delaying or

[1] Respondents did not submit with their Motion either the dissenting opinion of Commissioner Loevinger or the concurring opinion of Commissioner Cox in connection with the Commission's decision to file the Motion. The two opinions are attached hereto as Appendices A and B, respectively.

avoiding an adjudication of legality of the personal attack policy in these proceedings, while at the same time continuing to enforce that policy by one means or another. (We respectfully refer the Court to Commissioner Loevinger's dissent for a description of the procedural context in which the instant motion was made.) To hold the litigation in abeyance while at the same time applying the substance of the personal attack rules in another guise would be unfair not only to petitioners but to all broadcast licensees in the industry.

For respondents to leave it uncertain whether the first or second course would result from granting its motion would be even more inequitable.

Accordingly, we urge that respondents be required to file a prompt clarification of this point before the Court acts upon the motion.

II

The significance of the foregoing distinction becomes apparent from a brief recital of the regulatory context.

The Commission's personal attack policy was first enunciated in its present form in ad hoc rulings made in 1962.[2] In a 1963 Public Notice,[3] the Commission articulated the policy, including its notice and right-of-reply requirements, in terms quite similar to those in the instant regulation. The policy was enforced principally by the threat of loss of license, which was the only formal sanction. It was not challenged in the courts until *Red Lion*, since prior to that case it was widely assumed that judicial review of the Commission's letter-rulings under the policy could be obtained only in connection with a denial of license renewal.[4]

In adopting the present regulation, the Commission emphasized that it serves "to codify what has long been the Commission's interpretation of the personal attack aspect of the Fairness Doctrine." [5] Although codification has the effect of making a wider range of sanctions available to the Commission, the new regulations, in the Commission's words, "do not alter or add to the substance of the Doctrine.[6] The issuance of formal

[2] *Million Broadcasting Co.* (*Clayton W. Mapoles*). 23 R.R. 586 (1962); *Billings Broadcasting Co.*, 23 Pike & Fischer R.R. 951 (1962).

[3] FCC 63-734, 25 Pike & Fischer R.R. 1899.

[4] See *Red Lion*, 381 F. 2d at 910.

[5] Memorandum Opinion and Order, adopted July 5, 1967, p. 4; R. 349.

[6] *Ibid.* at 2; R. 347.

regulations, however, gave petitioners a chance to challenge the legality of the personal attack doctrine without risking loss of station licenses.

Consequently, if all the Commission proposes, while the Court holds this case in abeyance, is to turn the clock back to the day before the regulations were issued, it will have succeeded in delaying or evading a judicial test without relaxing in any degree the substantive restrictions. Conversely, although delayed in getting their day in court, petitioners and other licensees would be forced to comply with the very restraints that the Commission purports to be lifting during the interim period, through fear of the adverse effect of noncompliance in subsequent licensing proceedings.

We mean no unfairness to the Commission. Quite possibly it does intend to suspend the entire personal attack doctrine pending further rulemaking. If so, the Commission can readily clarify its position. The trenchant dissent of Commissioner Loevinger suggests, however, that we are not unduly apprehensive.

III

There is also basis for concern—in view of Commissioner Loevinger's dissent—over respondents' failure in their motion to suggest any time limit for the completion of the proposed further proceedings before the Commission. Absent such a limitation, the reopened rulemaking proceeding could be stretched over a lengthy period almost at the Commission's discretion—making it virtually certain that this case would not receive contemporaneous consideration with *Red Lion* in the Supreme Court, and thus achieving a primary tactical goal of respondents. It is noteworthy that the proceedings before the Commission which eventuated in the adoption of the present regulations consumed 15 months and that other Commission rulemaking proceedings have taken even longer.

We suggest that a 90-day period is ample for completion of the proposed further proceedings on an "expedited basis." The Commission would not, of course, be starting from scratch but instead would merely be revising a portion of a regulation concerning which it already has received voluminous comments and has already deliberated for more than a year. A 90-day limitation would be entirely feasible if the Commission genuinely intends to act expeditiously—and particularly if, as Commissioner Loevinger indicates, "the general nature of

the proposed revisions" has already been proposed to the Commission by its counsel.

Unless the Commission agrees in advance to complete its further proceedings within 90 days, we urge that the Court impose such a requirement as a condition to any grant of the motion.

CONCLUSION

Petitioners submit that, unless the Commission sets aside the entire substance of its personal attack doctrine pending further order of this Court and will complete its further rule-making proceedings within 90 days, respondents' motion should be denied.

[Appendices omitted]

RESPONSE OF PETITIONER, NATIONAL BROADCASTING COMPANY, INC., TO MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

This response is submitted in opposition to the motion dated March 1, 1968 by the United States of America and the Federal Communications Commission ("Commission") that these cases be held in abeyance, and that the Commission be authorized by the Court to conduct further proceedings upon an expedited basis for the purpose of reconsidering subparts (a) and (b) of the rules here under attack. NBC opposes the motion and urges that it be denied.

NBC further urges that, even if this Court concludes in its discretion that the motion should be granted, petitioners here are entitled to certain protective conditions, *i.e.*, that the Commission be stayed pending determination of the review proceedings from enforcement of the personal attack rule and the policy embodied in it, and on the further condition that the stay of this Court's proceedings be limited to a period of ninety days.

I

Grant or Denial of This Motion Rests Wholly Within the Court's Discretion

The relief sought by the Commission's motion to hold in abeyance is not, of course, a matter of right. If this Court is authorized to grant the remand at all, such grant or denial rests wholly within the Court's discretion. Under Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C.A. § 402(a), the statutory provisions which govern this petition for review are to be found in the Judicial Review Act of 1950 (formerly Chapter 19A of Title 5, 5 U.S.C. §§ 1031–1042, now codified in 28 U.S.C. §§ 2341–2351 (1967 Supp.)). By the terms of that Act, this Court's jurisdiction over the order here under review is "exclusive".

Thus, 28 U.S.C. § 2342 provides that "the court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part) or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable

by section 402(a) of Title 47 * * *". This jurisdiction is invoked "by filing a petition as provided by section 2344 * * *" *id.* Section 2349(a) of the Act reiterates the "exclusive" jurisdiction conferred on the court:

> The Court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals * * * has *exclusive jurisdiction* to make and enter * * * a judgment determining the validity of, and enjoining, *setting aside,* or suspending, in whole or in part, the order of the agency. (28 U.S.C.A. § 2349(a) (1967) Supp.) (Emphasis added).

The Commission in its motion papers assume that, in the light of the Court's exclusive jurisdiction, the Commission is without authority to act at this point without the Court's consent since it asks to be "authorized" to conduct the proceedings which it contemplates.[7] This assumption is undoubtedly correct. See, *e.g., Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364 (1939); *C.A.B.* v. *Delta Airlines, Inc.*, 367 U.S. 316, 334 (1961); L. Jaffe, *Judicial Control of Administrative Action*, 709 (1965).[8]

Indeed, there may be some question whether this Court may properly grant the Commission's motion, since there is no express statutory basis for doing so. The court, in *Fleming* v. *F.C.C.*, 225 F. 2d 523, 526 (D.C. Cir. 1955), observed that the Communications Act "confers no specific authority for remand without reversal", but held that the Court had inherent power to remand to the Commission for further factual

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[7] This is consistent with the Commission's previous practice. See *Matter of Amendment of Section 3.658(d) and (e), etc.*, FCC 63-497 (Docket No. 12859), 25 Pike & Fisher R.R. 1651, 1657 n.10 (1963) where the Commission, after the filing of a petition for review had conferred exclusive jurisdiction on the court of appeals, made a similar motion requesting the court to remand and to authorize the Commission to conduct further rule-making. That motion was not opposed. See also the consistent holdings to the effect that a remand to the Commission pursuant to 28 U.S.C. § 2349(a), *supra*, cannot divest the reviewing court of its exclusive jurisdiction. *E.g., WKAT, Inc.* v. *F.C.C.*, 296 F. 2d 375, 384 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 841 ("we think this statute does not contemplate that the agency can moot an appeal during a remand * * *"); *Massachusetts Bay Telecasters, Inc.* v. *F.C.C.*, 261 F. 2d 55, 67 (D.C. Cir. 1958).

[8] The decision in *Wrather-Alvarez Broadcasting Co.* v. *F.C.C.*, 248 F. 2d 646, 648-49 (D.C. Cir. 1957) is not to the contrary. There the Commission reconsidered its ruling after a notice of appeal had been filed but before the expiration of the time within which a petition for reconsideration had to be filed with the Commission. The Court held that during that period the Court and Commission had concurrent jurisdiction.

determinations "where the state of the record may preclude a 'just result'." (225 F. 2d at 526) There is, however, no contention made by the Commission that its desire to reconsider is based on any deficiency in the record. Neither does the Commission in its motion give any indication that it seeks the remand under 28 U.S.C. § 2349(c), which provides for remand (in certain narrowly limited circumstances) for the taking of further evidence by the agency.

Even if this Court does possess the authority to grant plaintiff's motion, it is clear that grant or denial of the motion is a matter of discretion. The Supreme Court held in *Ford Motor Co.* v. *N.L.R.B., supra:*

> * * * we are unable to conclude that the Board has an absolute right to withdraw its petition at its pleasure. We think that permission to withdraw must rest in the sound discretion of the court to be exercised in the light of the circumstances of the particular case. (305 U.S. at 370)

It is submitted that the Commission's motion does not make an adequate showing to support an exercise by this Court of its discretion to grant the requested relief, and that a consideration of all of the relevant circumstances strongly suggests that the Commission's motion should be in all respects denied.

II

The Judicial Review Now in Progress Ought Not To Be Suspended or Disrupted

The Commission's short motion, while requesting authorization "to conduct an expeditious rule-making proceeding looking toward [the] revision" of the personal attack rule gives no hint of the nature and extent of the proposed revision, nor does it provide any assurance that, after the additional rule-making proceedings are conducted, the rule will be revised at all.

Indeed, the motion indicates affirmatively that the revision contemplated is one which will not alter the significant issues in this case. The fundamental issue in these proceedings is whether the Commission may lawfully adopt *any* rule imposing on broadcasters its policy with respect to personal attacks; and any "reconsideration" which is not responsive to this basic challenge posed by petitioners can serve only to needlessly delay the final resolution of that issue.

The Commission's motion indicates that the decision to consider revision of the rule was prompted by "consideration and consultation with the Department of Justice * * *"; and Commissioner Cox in his concurring opinion states that "* * * we are acting, in part, at the urging of Assistant Attorney General Donald F. Turner, who formally represents the United States in these cases", and refers to the latter's letter to Chairman Hyde, dated February 29, 1968. (The concurring statement of Commissioner Cox and the dissenting statement of Commissioner Loevinger are annexed as Exhibit A.)

Mr. Turner's letter, a copy of which is annexed hereto as Exhibit B, makes it clear that the action which the Commission contemplates taking will in no way moot, or significantly alter, the issues raised by the review proceedings presently pending in this Court. Mr. Turner's letter states that the Department of Justice is "fully prepared to support the Commission's position that the 'fairness doctrine' is constitutional and within the Commission's statutory powers and, that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine." Mr. Turner indicates, however, that "the rule, as drafted, raises possible problems that might be minimized by appropriate revision". Mr. Turner does not identify those problems; but whatever they are, neither the Commission nor Mr. Turner is apparently willing to concede the basic illegality of the personal attack policy and the rule, here under review, which embodies it.

The briefs which have already been filed by the petitioners in this Court raise important statutory and constitutional issues affecting, not merely the drafting details of the Commission's personal attack and editorializing rules, but its fundamental power to act in this area. The Commission's proposed additional rule-making proceedings look at most toward the revision, and probably the modest revision, of the rules now under attack, rather than to the abrogation of the rule or to the abandonment by the Commission of its policy in this area. Since that is true, allowing the Agency to begin further rule-making proceedings at this stage is unwarranted. Returning the matter to the Commission is particularly inappropriate in view of the Commission's failure to advise the Court and the parties what changes in the rule it proposes to consider. If the Court had been advised what proposed revisions the Commission had in mind, it could have itself assessed their bearing on

the issues before it. Without such advice it is compelled to evaluate the Commission's request in the dark.

Nor does the Commission's request, addressed to the discretion of this Court, moot the review proceeding. It is well-settled that voluntary discontinuance of allegedly unlawful conduct does not of itself moot an action brought to suppress such conduct, where "a dispute over the legality of the challenged practices" remains and "the defendant is free to return to his old ways", *United States* v. *W. T. Grant & Co.*, 345 U.S. 629, 632 (1953); *Walling* v. *Helmerich & Payne*, 323 U.S. 37 (1944); *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498 (1911); *Heilberg* v. *Fixa*, 236 F. Supp. 405, 407 (N.D. Calif. 1964), *aff'd sub nom, Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). *Cf. Technical Radio Laboratory* v. *Federal Radio Commission*, 36 F. 2d 111, 113 (D.C. Cir. 1929); see also *Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153, 168 (1958). Where the dispute over the legality of the agency's acts is a "continuing" one and the public interest in seeing it resolved is urgent, mootness ought not to be allowed to prevent judicial review. *Southern Pacific Terminal Co.* v. *I.C.C.*, *supra.*[*] Obviously, this is such a case.

It is also significant that the Supreme Court of the United States has ordered that argument in a case involving closely-related issues, *Red Lion Broadcasting Co.* v. *F.C.C.*, 381 F. 2d 908 (D.C. Cir. 1967), *cert. granted*, December 4, 1967, be postponed pending a decision in this case by this Court, and any subsequent petition for certiorari, thus evidencing its interest in the Commission's policy in this area and the desirability of having an opportunity to review and evaluate that policy in the light, not only of the facts of the *Red Lion* case, but of the considerations raised and argued in this case. To grant the Commission's motion would either frustrate the intention of the Supreme Court to consider the issues in the fashion it deems most appropriate, or alternatively, result in further delay of the resolution of the issues in the *Red Lion* case.

Moreover, the Commission's stated desire to "reconsider" its policies with respect to "personal attacks" is manifested at an exceedingly advanced stage of the proceedings. These "per-

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[*] A different case may be presented, and the case be found "moot", where the agency in question has admitted that the challenged acts were illegal, and has amended its practice accordingly, *Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324, 330-3 (1961), but the Commission here has done no such thing.

sonal attack" policies were first formulated and applied to licensees by the Commission in 1962 (see Brief of NBC at pp. 9–10). The Notice of Proposed Rule Making was issued in April 1966, and voluminous comments from the industry were invited and received; the rule was formally adopted in July, 1967, and then amended by the Commission, *sua sponte*, in August, 1967 (Brief of NBC at pp. 2–3). Finally, the several petitioners' briefs have already been filed, and the date for filing the Commission's brief in response (a date previously extended by this Court, at the request of the Commission and without any intimation having been given that the Commission contemplated making this motion) has passed.

It has been held by the Supreme Court that the promulgation of formal rules by the Commission after rule-making proceedings of the sort conducted here is reviewable under 47 U.S.C.A. § 402(a) once "the process of rule-making was complete," *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956). See also *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 418–19 (1942). It is submitted that, once the Commission has concluded a proceeding and adopted an order or rule which it regards as final, and which is subject to judicial review, it ought not to be given a free hand to interrupt judicial review of that order by recalling it for adjustment or revision during the course of the review proceeding. Once the Court's exclusive jurisdiction attaches, sound judicial administration dictates that it should be suspended for further agency action only under circumstances clearly contemplated by the statutes governing the judicial review or in circumstances where the Court has itself determined, in the exercise of its review authority, that further agency proceedings, as, for example, by way of the making of additional findings or the taking of additional evidence, are necessary (see, *e.g.*, *Fleming* v. *F.C.C.*, supra).

Even in terms of effective administration on the part of the Commission itself the proposed suspension of this Court's proceedings makes little sense. At issue in this case, and in the *Red Lion* case now pending in the Supreme Court, is the fundamental question whether the Commission has authority to act at all in the area dealt with by these rules. Mr. Turner has suggested that the Commission may make "appropriate revisions" which might "minimize" certain unidentified "possible problems". Surely, effective utilization of the time of the Commission and of the courts is not achieved by going forward with

such proposals while the Commission's power to act in this area and the scope of any such power, remain in doubt.

CONCLUSION

Under all of the circumstances, it is respectfully requested that the Court exercise its discretion to deny the Commission's motion in its entirety.

If, however, the Court concludes that the Commission should be permitted, on some terms, to conduct the rule-making proceedings for which it requests authorization, it is submitted that some protective provisions are necessary. First, in order that a resolution of the important issues presented here not be unduly delayed, the time during which this Court's proceedings are held in abeyance so that the Commission can take further action should be limited. It is submitted that ninety days should be ample time for the Commission to conduct its further rule-making proceedings on an "expedited basis".

Action is also necessary to protect the industry from enforcement of the personal attack rule and policy during the period in which judicial review is frustrated by the Commission's reconsideration of its rule. This is particularly important in view of the accelerating pace of the 1968 election campaigns and the likelihood of the multiplication of claims alleging "personal attacks" during the forthcoming months. It is therefore submitted that the Commission should be stayed from further enforcement of its personal attack rule and policy until further order of this Court.

[Exhibits omitted]

AMENDMENT TO ANSWER OF RADIO TELEVISION NEWS DIRECTORS ASSOCIATION ET AL. TO MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

Petitioners Radio Television News Directors Association *et al.* hereby submit this amendment to their Answer to respondent's Motion to Hold Cases in Abeyance and to Authorize Further Proceedings, and state as follows:

1. On March 14, 1968, petitioners filed their answer to respondent's motion, filed March 4, 1968, requesting this Court to hold the instant cases in abeyance and to authorize further proceedings before the Federal Communications Commission looking toward revision of its personal attack regulations.

2. Subsequently, on March 19, 1968, the Commission issued an order, to which was attached a dissenting statement by Commissioner Loevinger and a concurring statement by Commissioners Johnson and Cox, in connection with a license renewal proceeding pending before it (*Brandywine Main Line Radio, Inc.*, FCC 68–298). That order and the dissenting and concurring statements are, we believe, pertinent to this Court's determination of respondents' pending motion. In particular, we respectfully direct the Court's attention to the statement of Commissioners Johnson and Cox that "[i]n fact, no material change in the personal attack rules is contemplated by the Commission."

3. A copy of the Commission's order and the dissenting and concurring statements is attached hereto as Appendix A.

APPENDIX A

Before the Federal Communications Commission

WASHINGTON, D.C. 20554

Docket No. 17141, File Nos. BR–178 and BRH–1320

In re Applications of BRANDYWINE-MAIN LINE RADIO, INC. For renewal of licenses of Stations WXUR and WXUR–FM Media, Pennsylvania

Order

Adopted March 9, 1968; Released March 19, 1968

By the Commission: Commissioner Bartley abstaining from voting; Commissioner Loevinger dissenting and issuing a statement; Commissioner Wadsworth not participating; Commissioner Johnson concurring and issuing a statement in which Commissioner Cox joins.

1. The Commission has before it for consideration a motion filed by Brandywine-Main Line Radio, Inc. (WXUR) on March 12, 1968, and a letter of March 14, 1968, requesting temporary suspension of the proceedings in the above matter pending action by the United States Court of Appeals for the Seventh Circuit on the Commission's request for authority to conduct further rule making on the personal attack rules of the fairness doctrine[1] and pending conclusion of any further rule making which may be authorized by the Court.

2. As set forth in our Memorandum Opinion and Order (FCC 67-99, released January 25, 1967), the above WXUR renewal applications were designated for hearing on a number of issues bearing on the applicant's qualifications to be a licensee. The hearing has been in progress since October 2, 1967. We are of the view that a temporary suspension of the proceedings at this juncture would serve no useful purpose and is not in the public interest.

3. *Accordingly, it is ordered,* That the above motion for temporary suspension of the proceedings filed by Brandywine-Main Line, Inc., on March 12, 1968, *Is denied.*

FEDERAL COMMUNICATIONS COMMISSION,[2]

BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER LEE LOEVINGER

(Re: Application of personal attack principle to WXUR)

This matter comes before the Commission on a motion by WXUR for temporary suspension of a hearing on its license renewal, on the grounds that the Commission is in the process of revising the substantive principles involved in that hearing.

[1] Motion to hold cases in abeyance and to authorize further proceedings filed March 1, 1968, in the cases of *Radio Television News Directors Association, et al.,* v. *U.S. and FCC* (Nos. 16,369, 16,498 and 16,499), pending in the United States Court of Appeals for the Seventh Circuit.

[2] See attached statements.

I think that fairness, rational procedures and due process of law require granting the motion. A somewhat detailed review of the facts is necessary to demonstrate this.

On April 8, 1966, the Commission issued a Notice of Proposed Rulemaking (Commissioner Loevinger absent) proposing "to codify the procedures which licensees are required to follow in personal attack situations." FCC 66-291, Docket No. 16574. The substance of the proposal was to add section 73.123 to the FCC rules stating, in language set forth in an appendix to the notice, the obligation of a broadcast licensee to advise any person or group of an attack upon his honesty, character or like personal qualities, within a specified time, and offering a reasonable opportunity to respond over licensee's facilities. Subsection (c) related to editorializing and is not relevant here.

On July 10, 1967, the Commission issued a Memorandum Opinion and Order adopting the rule relating to personal attacks as proposed in the April 1966 Notice. 8 FCC 2d 721 (1967). (Commissioner Loevinger concurred with a separate opinion, 8 FCC 2d 728.) There were slight differences in the order and numbering of the clauses, but the operative language adopted was identical with that proposed in 1966. The Commission opinion said that the purpose of adopting the rules was to "clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks * * *" (par. 3). The opinion explicitly stated, "These rules will serve to effectuate important aspects of the well established Fairness Doctrine; they do not alter or add to the substance of the Doctrine." A footnote said, "The only new requirement in these rules are [sic] the time limits, * * * within which licensees must act to fulfill their substantive obligations when they have broadcast personal attacks * * *" (Par. 3; fn. 3)

On January 25, 1967, the Commission ordered a hearing on the application of WXUR for renewal of its license. FCC 67-99, Docket No. 17141. The principal issue concerned the compliance by WXUR with the Fairness Doctrine. A number of groups and individuals charged WXUR with failure to comply with the Fairness Doctrine, particularly in respect to the personal attack principle, and WXUR consented to an evidentiary hearing in order to secure a determination of the controversy. The Commission specified a number of issues, including an issue as to whether WXUR "has complied with the personal attack principle of the Fairness Doctrine" by fol-

lowing the procedures that had been specified in the personal attack rule proposed in 1966 and adopted in 1967, as noted above.

Subsequent to the promulgation of the personal attack rules, the Radio Television News Directors Association and others appealed the validity of the rules to the United States Court of Appeals for the Seventh Circuit. That appeal is still pending. On March 1, 1968, the Commission moved the Court of Appeals to hold that appeal in abeyance and to authorize the Commission to conduct further rule making proceedings. The entire ground of the motion was stated as follows:

> The ground of this motion is that the Commission, upon further consideration and consultation with the Department of Justice, has determined, Commissioner Bartley abstaining and Commissioner Loevinger dissenting, to set aside those parts of the rules at issue dealing with personal attacks (subparts (a) and (b)), and to conduct an expeditious rule making proceeding looking toward their revision.

That motion was authorized and filed over my objection and dissent, for reasons which are set forth in my dissenting statement and will not be repeated here.

Following the filing of that motion, WXUR moved the Commission for a temporary suspension of the proceedings involving the renewal of the WXUR license and the charges of violation of the Fairness Doctrine, including the personal attack principle. The hearing in the WXUR matter started October 2, 1967, and has continued intermittently since then. The hearing is in recess and will resume pursuant to the Commission's summary denial of the motion for a temporary suspension.

In dissenting to the effort of the Commission to revise its rules during the course of litigation over their validity, I suggested that the course being followed by the Commission "falls considerably short of the diligence, promptness and candor which the Commission demands of its own licensees." The present action of the Commission illustrates and emphasizes that conclusion. The Commission has stated that the rules now before the Court of Appeals embody the personal attack principle of the Fairness Doctrine, adding only specific time limits for action. Certainly the Commission cannot now be asking the Court of Appeals to hold the cases in abeyance for modification

of the time limits. Such a motion would be patently frivolous and dilatory. Therefore the Commission must intend to make substantive revisions in the rules.

Assuming, as we must, that the Commission, if authorized by the Court, will make substantive revisions in the personal attack rules it will necessarily do either one of two things. Either the Commission will change the substance of the personal attack principle which is embodied in the rules, or it will change the Commission's interpretation of the personal attack principle which is embodied in the rules. No amount of logomachy or sophistry can avoid the conclusion that in reconsidering the personal attack rules the Commission either must change the substance or not change the substance.

The Commission has already declared to the Court of Appeals that it desires and intends to change the rules—which must mean to change the substance of the rules. Therefore the Commission is, in effect, committed either to abandon the prior personal attack principle as unsound, invalid, or, at least, indefensible in court, or to change its interpretation of this principle.

The hearing on the WXUR renewal involves the issue of compliance with the personal attack principle, which is stated there in almost the very words of the rule that the Commission now proposes to change. If the Commission is about to admit that the principle is unsound or to change the principle by changing its statement and interpretation, then it certainly makes no sense at all to continue a hearing based upon the about-to-be-abandoned-or-modified principle. But the problem is even simpler than this. WXUR says that it must know what interpretation or view of the personal attack principle the Commission takes in order to know what evidence is relevant to the issue of compliance. The same problem confronts the other parties to the proceeding. By insisting that the Hearing Examiner proceed with the WXUR hearing before determination of the uncertainty created by the Commission concerning the underlying principles involved, the Commission is stultifying that proceeding and frustrating the possibility of rational presentation or consideration of evidence on this issue.

If the Commission was correct in stating that the personal attack rules merely codified prior precedent and added only specific time limits for action, then the court test of the present rules is a fair examination of the basic principles which the Commission has developed in this field and which the Com-

mission seeks to apply in the WXUR case. If these principles are to be changed or abandoned, then the Commission should not only seek advantage to itself in its litigation but should give other parties whatever advantage there may be in the changes or abandonment of these principles. The Commission cannot fairly, properly and honestly demand that the validity of its principles be judged on the basis of some statement drafted specifically for the purpose of passing scrutiny before a court while it is simultaneously refusing to allow parties before it to be judged under the same statement of principles. The present position of the Commission seems to be that the personal attack principle means one thing when it is applied by the Commission to a party being judged before it, but that it means something else when the Commission is being judged before a court on the validity of that principle.

The Commission ruling on the WXUR motion not only casts further doubt on the propriety of the Commission motion in the Court of Appeals but forebodes increasing confusion and difficulty in this important and uncertain area during the coming months. At a time when the Commission and the country may confidently anticipate that there will be a substantial number of complaints and charges relating to fairness and personal attacks growing out of the coming elections, the Commission has made it impossible for anyone to know what the applicable principles or rules are or what course the Commission will follow, if the Court of Appeals permits it to follow its own course. The Commission now is needlessly and without purpose compounding confusion in a most delicate and dangerous area.

CONCURRING OPINION OF COMMISSIONER NICHOLAS JOHNSON IN WHICH COMMISSIONER KENNETH COX JOINS

I concur in the Commission's disposition of the motion before us and append these brief comments only in order not to leave unanswered the dissenting statement filed by Commissioner Loevinger.

Over one year ago Brandywine-Main Line Radio, Inc., licensee of WXUR-AM and WXUR-FM of Media, Pennsylvania, applied for renewal of these broadcast licenses. On January 25, 1967, the Commission designated the applications for hearing on a number of issues bearing on the applicant's qualifications to be a licensee. The hearing has been in progress since October 2, 1967.

In today's action, we have denied Brandywine's request that we suspend the renewal hearing, pending action by the Court of Appeals for the Seventh Circuit in a separate case wherein the legality of the personal attack rules promulgated by the Commission in July 1967 are at issue. *R.T.N.D.A., et al* v. *U.S. and F.C.C.* (case numbers 16369, 16498, 16499). In that case, the FCC has requested authority to revise further the personal attack rules. Brandywine notes that the product of the pending revision will probably be a "less restrictive" set of regulations than those presently on our books. Therefore, it contends, it is entitled to take advantage of any modifications which might be favorable to its renewal case, and that a suspension of the proceedings is necessary to grant this deserved opportunity.

But fairness to WXUR does not require such a suspension. It is extremely unlikely that any changes in the rules will affect the situation under review in Brandywine's renewal hearing. If by chance the new standards turn out to affect materially Brandywine's case, the Commission will be more than willing to grant counsel the opportunity to introduce into the record whatever new evidence or contentions they consider appropriate. Suspension of the hearing presently in progress will do Brandywine no good—except insofar as it causes delay and thereby puts off the day when the Commission eventually renders judgment on the ultimate question of its qualifications as a licensee.

In view of the simple and inconsequential procedural question at stake herein, Commissioner Loevinger is to be congratulated on both the length of his dissenting opinion and on the remarkable show of indignation he has mustered. As in his similar condemnation of the Commission's recent decision to ask the Seventh Circuit Court of Appeals for leave to revise the personal attack rules, Commissioner Loevinger's remarks distort the purpose and effect of our action. FCC Public Notice No. 13493, March 1, 1968 (concurring opinion of Commissioner Cox). They deserve, therefore, a brief response.

First, it should be pointed out that, contrary to the impression created by Commissioner Loevinger's opinion, WXUR's performance is being judged on five separate issues—not just the question of its compliance with the Commission's personal attack requirements. In the Memorandum and Order originally designating the application for hearing, we defined those issues as: (1) whether the applicant has met the conditions set forth

in the Commission's Memorandum Opinion and Order of March 17, 1965 (FCC 65-207) during its license period from April 29, 1965 to August 1, 1966; (2) the efforts, if any, which the applicant has made to ascertain and serve the needs and interests of the public served by its stations; (3) whether the applicant fully and candidly advised the Commission of its program plans in connection with its application for acquisition of control of the stations involved; (4) the applicant's efforts to comply with the Commission's Fairness Doctrine, including the personal attack principle; and (5) whether the applicant has used the facilities of its stations to serve the sectarian and political views of its principals and to raise funds for their support rather than to serve the community generally, and whether this was misrepresented to the Commission in its application for acquisition of control of these stations.

There would be no point to suspending a hearing, which has now been in progress since October 2, 1967, on the ground that the standards governing one of the five points at issue might soon undergo material modification—even if such a material change were in the offing.

In fact, no material change in the personal attack rules is contemplated by the Commission. Commissioner Loevinger is well aware of this fact, since he participated in the meeting at which the matter of seeking authority from the Court of Appeals was discussed. Nevertheless, he speculates that we may "abandon the prior personal attack principle as unsound, invalid, or at least, indefensible in court. * * *" I believe it important to record that Commissioner Loevinger speaks only for himself in this regard, and does not reflect the understanding or belief of the majority of the Commission. It would be unfortunate if his characterization of the majority's intentions were to be used in support of a campaign to discredit the basic principle which Commissioner Loevinger originally endorsed but has now decided to regard with distaste.

Since none of the five Commissioners who voted to seek authority to revise the rules share Commissioner Loevinger's new doubts about either the wisdom or the legality of the basic personal attack principle, the possibility is especially slim that the forthcoming revisions will bear on WXUR's case. The WXUR licenses were designated for hearing *before* the present rules were promulgated. To the extent that personal attack questions are involved in the hearing, they will relate to the

principle as enunciated in individual cases decided before it was codified in the rules. Therefore, any revision of the new rules will not affect Brandywine's case in any event. Practically speaking, there is little chance that a radical change will occur.

In sum, I believe the Commission's ruling in this case to be commendably expeditious and equitable as well as legal, and hope these few words of explanation will help to quell whatever specters have been raised by Commissioner Loevinger.

REPLY OF RESPONDENTS TO PETITIONERS' RESPONSES TO RESPONDENTS' MOTION TO HOLD CASES IN ABEYANCE AND TO AUTHORIZE FURTHER PROCEEDINGS

The respondents have moved this Court to hold these cases in abeyance in order to permit the Federal Communications Commission to revise the personal attack rules under review. In response to this motion, petitioner CBS has stated that it has no objection so long as the Commission is prohibited from putting any personal attack reply requirements into effect pending disposition of the present cases. Petitioner RTNDA, raising the question of the difficulties presented by a hiatus during the course of further rule making, urges that a 90 day limit be placed upon further proceedings and states that it does not object to grant of the motion if the Commission's rules and its past policy are set aside while the rules are being revised. Petitioner NBC opposes the motion, essentially on the ground that voluminous comments have already been submitted to the Commission, that there is no warrant for permitting further revision, and that the basic constitutional and statutory problems would not be affected by revision of the rule.

Respondents agree that any extended further proceedings before the Commission would be undesirable, particularly from the public interest viewpoint of the importance of having settled policy in this area. As both NBC and RTNDA have pointed out, a full rule making proceeding with voluminous comments has already been held. In light of this fact, the Commission proposes immediately to revise its rules in the event this Court grants the pending motion, without seeking further comment. Attached hereto is a Proposed Memorandum Opinion and Order revising subsection (b) of the rules which the Commission proposes to adopt. It would further exempt from the requirements of the rules commentary in newscasts and in on-the-spot coverage of news events, and news interviews, including commentary. This procedure of immediate revision, although necessarily subject to consideration of any petitions for reconsideration which might be filed, should avoid any extended hiatus, and any need to consider a stay pending further proceedings. We believe that it will also permit an

early hearing of these cases. The Government is prepared to meet any expedited schedule set by the Court for such revised or supplemental briefs of petitioners as may be appropriate and the filing of the Government's brief.

However, we do not agree with NBC that it is appropriate to require the Commission to maintain rules it wishes to change. Petitioners have no vested right to the present form of the rules. *Ford Motor Co.* v. *Labor Board*, 305 U.S. 364 (1939). Nor do we believe it desirable to proceed with argument while the rules are being changed, since the large constitutional questions presented should clearly be decided upon the basis of the precise rules finally adopted by the Commission.

Finally, we strongly oppose the request of CBS that this Court stay in advance any revised rules which the Commission may adopt. No request for a stay *pendente lite* has been made by any of the petitioners in these cases, and the present CBS request not only applies to rules whose nature and effect are as yet unknown, but is unaccompanied by any attempt to make the showing of irreparable injury which is a requisite for the injunction requested.

MARCH 22, 1968.

Before the Federal Communications Commission

Docket No. 16574

In the Matter of Amendment of Part 73 of the Rules relating to procedures in the event of a personal attack.

PROPOSED MEMORANDUM OPINION AND ORDER

Adopted: Released:

By the Commission:

1. On March 8, 1968, the Commission and the Department of Justice requested the Court of Appeals for the Seventh Circuit to hold in abeyance the cases pending before it seeking review of our personal attack and political editorial rules (*Radio Television News Directors Assn., et al.* v. *United States*, Case Nos. 16,369; 16,498; and 16,499), and to authorize the Commission to revise the personal attack rules. This opinion and order deals with that revision. Since the revision is of a

relatively narrow nature[2] and directed only to subsection (b) of Sections 73.123, 73.300, and 73.598, we shall not repeat the discussion in our prior opinions pertinent to subsections (a) and (c).[3] In short, we remain of the same view as to the legality and desirability of the personal attack rule, and wish to revise only one portion of it. See *Red Lion Broadcasting Co.* v. *United States*, 381 F. 2d 908 (C.A.D.C.), *certiorari granted*, —— U.S.

2. The issue with which we are concerned here is the alleged inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licenses. Even on the basis of the materials presented by the Columbia Broadcasting System (CBS) to the Court for the first time, the showing as to inhibiting effects remains speculative. But in view of the policy considerations discussed below, we believe that a revision would be appropriate.

3. We have consistently sought to promote the fullest possible robust debate on public issues. See *Letter to Storer Broadcasting Co.*, January 31, 1968, FCC 68–120. We have also stated our belief that the fairness doctrine promotes that goal. *Ibid.* CBS does not dispute the latter, but does claim, *inter alia*, that the personal attack facet of the doctrine inhibits the discharge of important broadcast journalistic functions in areas such as news analysis or commentary by its newsmen or the presentation of controversial public figures on its news shows. As in the case of the 1959 Amendments to Section 315, what is called for is "balancing public policy considerations" (H. Rept. No. 802, 86th Cong., 1st Sess., p. 4). On the one hand, we take into account the considerations set forth in our prior discussion pertinent to this claim (see Memorandum Opinion and Order, 9 F.C.C. 2d 539, n. 1) and our assessment of the present showing in this respect as to inhibitions. On the other hand, there are two important considerations which, taken together, do make the case for revision:

(a) The 1959 Amendments to Section 315 stressed the im-

[2] Some other matters simply call for a common sense reading of the rule. Thus, if the person attacked has previously been afforded a fair opportunity to address himself to the substance of the particular attack, fairness and compliance with the rule have clearly been achieved. Similarly, as shown by the introductory phrase, "when, during the presentation of views on a controversial issue of public importance * * *", the rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in that discussion.

[3] See Memorandum Opinion and Orders; 8 F.C.C. 2d 721 (July 5, 1967; 32 Fed. Reg. 10303) and 9 F.C.C. 2d 539 (Aug. 2, 1967; 32 Fed. Reg. 11531).

portance of broadcast journalism in informing the public "with respect to political events and public issues" (H. Rept. No. 802, 86th Cong., 1st Sess., p. 4) and, on that basis, exempted four categories of programs—bona fide newscasts, news interviews, and news documentaries, and on-the-spot coverage of bona fide news events—from the "equal opportunities" requirement of Section 315, stating that the fairness doctrine would remain applicable. While there are practical differences in its impact, the personal attack facet can have some similarities to the "equal opportunities" requirement in its application in this area.

(b) We have not had problems in this area over our many years of applying the fairness doctrine. For example, the 1959 exemption has worked well with respect to political candidates and the fairness afforded them in these news-type programs. As a general matter, unlike areas such as editorializing by licensees or syndicated programming where we have found some flagrant failures by licensees to follow the requirements of the fairness doctrine with respect to personal attacks, there has been no similar pattern of abuses in these news categories. This may well stem from the consideration that what is involved is news gathering or dissemination—an area where the licensee must be scrupulously fair. See *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1254–55. See Sen. Rept. No. 560, 86th Cong., 1st Sess., where it is stated (p. 11):

> It should be noted that the programs that are being exempted in this legislation have one thing in common. They are generally news and information-type programs designed to disseminate information to the public and in almost every instance the format and production of the program is under the control of the broadcast station, or the network in the case of a network program.

In light of the above two considerations, we have decided to strike the balance in favor of exempting these news categories, other than the news documentary. It avoids *any* possibility of inhibition in these important areas of broadcast journalism, without appearing to raise any greater problem of abuse than was the case in the 1959 exemption as to "equal opportunities." The fairness doctrine remains specifically applicable to these programs. See Section 315(a); H. Conf. Report No. 1069, 86th Cong., 1st Sess., p. 5; see par. 5, below.

4. We shall expand the exemptions in (iii) of subsection (b)

to include the bona fide news interview and news commentary or analysis in a bona fide newscast. Such commentary or analysis is an integral and important part of the news process involved in the category, "bona fide newscast." The bona fide news interview is similarly a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments and as to which factor (b) in the above paragraph is applicable.[4] We have not exempted the labelled station or network editorial, even if occurring in one of these exempt categories. Where a licensee's editorial discussing an issue of public importance contains a personal attack which makes the honesty, integrity, or character of an identified person or group an issue in the discussion, his action is akin to that in the political editorializing area. We have stated that the licensee has the right to editorialize (see Hearing before a Subcommittee of the House Interstate and Foreign Commerce Committee, 88th Cong., 1st Sess., pp. 83–94), but that right carries, we believe, the concomitant duty in these two instances of notifying the appropriate group, person, or candidate attacked and offering an opportunity to respond. See par. 3, 9 F.C.C. 2d 539.[5] We note that in this area we have found instances of failure to comply fully with the requirements of the fairness doctrine. Finally, as stated, we have not exempted the news documentary. The Section 315 exemption is limited to bona fide documentaries where the appearance of the candidate is incidental to the presentation of the subject matter of the documentary; his rivals may have no connection with the program at all. In the case where the licensee presents a documentary which makes the honesty, integrity, or character of a person an issue in its discussion of some controversial issue, the response of the person attacked is clearly germane and important to informing the public fully. There is no factor of even *possible* inhibition in the case of a documentary, which is as-

[4] We stress that the categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these exempt categories, to the extent pertinent, will be followed in this field also. (See, e.g., H. Rept. No. 1069, 86th Cong., 1st Sess., p. 4, as to the legislative history of the term "bona fide news interview."

[5] We note that this duty is recognized in the industry. Thus, in 1963 the President of CBS told a Congressional committee that in 99 cases out of 100 CBS would try to get the subject of an adverse CBS editorial to reply, the 100th case being one where someone might want to come on and use foul language or other improper behavior. (1963 House Hearings on Broadcast Editorializing, pp. 266–267.)

sembled over a period of time. Rather, the matter is one where the person's response can be readily obtained and, indeed, we would expect this to be the usual practice. See note 4, *supra*.

5. As stated, the fairness doctrine is applicable to these exempt categories. Under that doctrine, the licensee has an affirmative duty generally to encourage and implement the broadcast of contrasting viewpoints (par. 9, *Report on Editorializing by Broadcast Licensees*, 13 F.C.C. at p. 1251). The licensee has considerable discretion in choosing ways to discharge that affirmative duty. See *Letter to Capital Broadcasting Co., Inc. (WRAL)*, July 29, 1964, FCC 64-774. In the case of the personal attack there is not the same latitude. Under our revision with respect to the exempt categories, the licensee may choose fairly to present the viewpoint of the person or group attacked on the attack facet of the issue; in that event, and assuming that the licensee has acted reasonably and fairly, the doctrine is satisfied. But if the licensee has not done so or made plans to do so, the affirmative duty referred to above comes into play. And here it obviously is not appropriate for the licensee to make general offers for contrasting viewpoints, either over the air or in other ways in his community. There is a clear and appropriate spokesman to present the other side of the attack issue—the person or group attacked. Thus, our revision affords the licensee considerable leeway in these news-type programs but it still requires that fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond.

6. In sum, since our goal is to encourage robust, wide-open debate, we have re-examined the question presented here, and have concluded that the application of the personal attack principle to these news-type programs can be more limited, thus simplifying the licensee's responsibility in fulfilling his journalistic functions without materially interfering with the public interest objectives of the personal attack principle. In so doing, we further accord with the 1959 Amendment to Section 315(a) of the Communications Act by which Congress sought to give greater latitude to licensees in carrying out their journalistic role in political campaigns toward the goal of an informed electorate. We believe similar considerations call for broadcast licensees to have largely comparable freedom in determining the

method of presenting the contrasting viewpoints as to personal attacks occurring in the news-type programs here exempted. The long-standing and fundamental obligation of the broadcast licensee to present news impartially provides the foundation upon which we rely in exempting these news-type programs from the precise requirements of the personal attack rules so as to eliminate *any* possibility of inhibitory effects.[6]

7. We have acted here to expand the exempt categories further along the lines of the exemption made on August 2, 1967 (FCC 67–923),[7] on the basis of the notice and the comments received in this docket (No. 16,574). In urging the adoption of the 1959 Amendments, the Senate Report (No. 562) states (p. 14):

> * * * the public interest should benefit from it. If not, adequate opportunity to remedy it is available.

That is equally apt here, both from the standpoint of this revision and any other revisions which may be called for upon the basis of experience.

8. Authority for the rules herein adopted is contained in Sections 4 (i) and (j), 303(r) and 315 of the Communications Act of 1934, as amended.

Accordingly, *It is ordered*, That the rule revisions contained in the attached Appendix ARE ADOPTED, effective. See Sec-

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[6] We recognize that an argument can be made that news commentary or analysis within the bona fide newscast is exempted but comparable material is not exempted if broadcast outside one of the exempt categories. The short answer is that we are following the line drawn by the Congress, which would also exempt a film clip of a candidate in, for example, a news analysis or commentary segment only if it comes within an exempt program. Further, while our action here exempts these categories upon the basis of the parallel to the 1959 Amendments and the absence of any pattern of abuse of fairness in these news areas, it is important to bear in mind that the action is taken as a precautionary step, to eliminate any possibility of inhibiting effects in these areas which were singled out by the Congress. We have found no such effects, and therefore stress that we are not saying or indicating that inhibition of robust, wide-open debate is appropriate or likely in areas other than those exempted here.

[7] While a further notice is not legally required, we considered the desirability of such a further notice. However, we believe that such a notice and further proceedings are unnecessary in light of the nature of our action and the grounds therefor (par. 3, *supra*), and would be undesirable in view of the uncertainty that would beset this important field during this critical election year period. Our present action also facilitates the earliest possible review of these rules—another highly desirable consequence.

tion 4(c), Administrative Procedure Act. This proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

Attachment

APPENDIX

In Part 73 of Chapter I of Title 47 of the Code of Federal Regulations, §§ 73.123(b), 73.300(b), 73.598(b) and 73.679(b) are revised to read identically as set forth in § 73.123 below:

§ 73.123 Personal attacks; political editorials.

* * * * *

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, on-on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

Note: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance,* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

* * * * *

DISSENTING OPINION OF COMMISSIONER LEE LOEVINGER

I dissent from the Commission motion to amend the rules now pending before the Court of Appeals because I believe that the course the Commission has followed with respect to these

rules has been hasty, ill-considered and inadequate, and the revision now proposed is substantively defective. However, the present motion effectively supersedes the motion made March 1, 1968, in these cases, is more specific and limited and less dilatory than the March 1st motion, and in these respects partially meets some of the objections to the Commission course noted in my dissent to the March 1st motion and to the Commission ruling on a related matter in the WXUR case. If the Court grants the present Commission motion, the Commission must thereafter act formally to adopt the proposed revisions to the rules; and it will then be appropriate to state my objections to them in detail. If the Court does not grant the present motion neither the proposed revisions to the rules nor the objections to them will be significant. Thus it is sufficient at this point to note my dissent and reserve detailed and substantive comment until the substantive issue is before the Commission.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissented to the Commission's action of July 5, 1967, adopting these personal attack rules and stated:

> "The Fairness Doctrine is in the process of being perfected on a case-by-case basis. I believe, therefore, that codification by rule is premature." (Docket No. 16547)

I hold to that view.

United States Court of Appeals for the Seventh Circuit
Chicago, Illinois 60604

March 22, 1968

No. 16369

Before Hon. LATHAM CASTLE, *Circuit Judge*, Hon. LUTHER M. SWYGERT, *Circuit Judge*, Hon. WALTER J. CUMMINGS, *Circuit Judge*.

RADIO TELEVISION NEWS DIRECTORS ASS'N, ET AL.

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION

CBS *v.* U.S.A. AND F.C.C., No. 16498

NBC *v.* U.S.A. AND F.C.C., No. 16499

Order

Upon consideration of the motion to hold these cases in abeyance, the responses thereto, the Government's reply, and the amended answer of Radio Television News Directors Association, et al., it is ordered that the motion be denied, but leave is granted to the Federal Communications Commission to revise forthwith subsection (b) of the rules involved in these petitions for review.

The Government's brief shall be filed on or before April 1, 1968, and the petitioners' reply briefs within 15 days thereafter. Since petitioners may need to discuss the new rules in their reply briefs, the usual 20-page length will not apply.

MOTION OF PETITIONER FOR LEAVE TO FILE SUPPLEMENTAL EXHIBIT

Petitioner Columbia Broadcasting System, Inc., by its attorneys, hereby moves this Court for leave to file with its reply brief in the above-captioned case a separately bound Supplemental Exhibit. In support of this Motion, the attorneys for Petitioner state:

One of the important issues in this case is the legality of the Federal Communications Commission's "personal attack" rules. In connection with its opening brief as to the effect of the rules on Petitioner's public affairs programming, Petitioner prepared an Exhibit setting forth excerpts from transcripts of programs that contained statements arguably covered by the rules. On November 21, 1967, this Court granted Petitioner leave to file this Exhibit together with its brief. Petitioner's Supplemental Exhibit, discussed in its reply brief, sets forth excerpts from transcripts of programs and other material pertinent to the Commission's revised rules. Petitioner believes this material is relevant and will be of assistance to this Court in its consideration of the case.

All parties in this case, and the companion cases (Nos. 16,369 and 16,499) pending in this Court, have consented to the granting of this Motion. Respondents, United States of America and the Federal Communications Commission, however, consent subject to the argument contained in footnote 40, p. 54 of their brief.

APRIL 16, 1968.

United States Court of Appeals for the Seventh Circuit

CHICAGO, ILLINOIS 60604

Wednesday, April 17, 1968

No. 16498

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petition for Review of an Order From the Federal Communications Commission

Before Hon. LUTHER M. SWYGERT, *Circuit Judge.*

On consideration of the motion of counsel for petitioner,

It is hereby ordered, That leave be granted to file instanter with petitioners reply brief a separately bound Supplemental Exhibit.

In the United States Court of Appeals for the Seventh Circuit

September Term, 1967—April Session, 1968

Nos. 16369, 16498, and 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

COLUMBIA BROADCASTING SYSTEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

NATIONAL BROADCASTING COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

September 10, 1968

Petitions for Review of Orders of the Federal Communications Commission

Before CASTLE, *Chief Judge*, KILEY and SWYGERT, *Circuit Judges*.

SWYGERT, *Circuit Judge*. This review raises the question of the constitutionality of the Federal Communications Commission's recently promulgated rules concerning the airing of personal attacks and political editorials by broadcasters licensed by the Commission. An unincorporated association of radio and television journalists and eight companies holding licenses for

radio and television stations[1] petitioned this court to review and set aside the final order of the Commission,[2] issued on July 10, 1967 (adopted on July 5, 1967); which set forth the new rules.[3] The Columbia Broadcasting System, Inc., (CBS) and the National Broadcasting Co., Inc., (NBC) filed separate petitions to review the Commission's order in the Court of Appeals for the Second Circuit. These petitions were transferred to this court (28 U.S.C. § 2112), and pursuant to our order, the three petitions were consolidated.[4]

On April 8, 1966, the Commission released a Notice of Proposed Rule Making. The announced purposes of the rules proposed by the Commission were "to codify the procedures which licensees are required to follow in personal attack situations" and "to implement the *Times-Mirror* [5] ruling as to station editorials endorsing or opposing political candidates." In its notice, the Commission invited interested parties to file comments on

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[1] These petitioners are Radio Television News Directors Association, Bedford Broadcasting Corporation, Central Broadcasting Corporation, The Evening News Association, Marion Radio Corporation, RKO General, Inc., Royal Street Corporation, Roywood Corporation, and Time-Life Broadcast, Inc. This group of petitioners will be collectively referred to hereafter as RTNDA.

[2] Commissioner Bartley dissented, Commissioner Loevinger concurred and Commissioner Wadsworth was absent.

[3] The rules as set forth in the July 10 order appear in the appendix to this opinion.

[4] Three amicus curiae briefs were filed in this court. The briefs of King Broadcasting Company and the National Academy of Television Arts and Sciences opposed the Commission's rules. The brief of the Office of Communication of the United Church of Christ and other religious organizations favored the Commission's rules.

[5] *Times-Mirror Broadcasting Co.* (KTTV), 24 P & F Radio Reg. 404 (1962). During the 1962 California gubernatorial campaign, a television station engaged in the "'continuous' and 'repetitive' * * * presentation of views * * * on the campaign as compared to a 'minimal opportunity afforded to opposing viewpoints' and * * * from time to time, 'personal attacks on individuals and groups involved in the * * * campaign'." 24 P & F Radio Reg. at 405. The Commission informed the licensee:

"Under the fairness doctrine, when a broadcast station permits, over its station facilities, a commentator or any person other than a candidate to take a partisan position on the issues involved in a race for political office and/or to attack one candidate or support another by direct or indirect identification, then it should send a transcript of the pertinent continuity in each such program to the appropriate candidates immediately and should offer a comparable opportunity for an appropriate spokesman to answer the broadcast." *Id.*

However, the Commission indicated that newscasts, news interviews, news documentaries, and on-the-spot coverage of news events "would not, as a general matter * * * appear to be encompassed by the Commission's ruling." *Id.* at 406.

the proposed rules. Of the twenty-six comments filed with the Commission, eighteen opposed and eight favored the adoption of the proposed rules.

In the rules dealing with the responsibilities and obligations of licensees with respect to personal attacks, a "personal attack" was defined as an attack upon the "honesty, character, integrity or like personal qualities of an identified person or group." A personal attack would come within the ambit of the rules, however, only if made "during the presentation of views on a controversial issue of public importance."

According to the Commission's Memorandum Opinion and Order, the personal attack rules were "simply a particular aspect of the Fairness Doctrine," and did "not alter or add to the substance of the Doctrine." The Fairness Doctrine was initially articulated in the *Report of the Commission in the Matter of Editorialization by Broadcast Licensees*, 13 F.C.C. 1246 (1949). In that report, the Commission stated the basic obligation of licensees to present broadcasts concerning public issues, in a manner which would insure that the listening public would be exposed to a broad spectrum of views on a given issue.[6] The Commission indicated that "specific Congressional approval" of the Fairness Doctrine was contained in the 1959 Amendments to section 315 of the Communications Act.[7]

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[6] The specific language in the report which gave birth to the personal attack aspect of the Fairness Doctrine follows:

"It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. Different issues will inevitably require different techniques of presentation and production. The licensee will in each instance be called upon to exercise his best judgment and good sense in determining what subjects should be considered, the particular format of the programs to be devoted to each subject, the different shades of opinion to be presented and the spokesmen for each point of view. In determining whether to honor specific requests for time, the station will inevitably be confronted with such questions as whether the subject is worth considering, whether the viewpoint of the requesting party has already received a sufficient amount of broadcast time, or whether there may not be other available groups or individuals who might be more appropriate spokesmen for the particular point of view than the person making the request. *The latter's personal involvement in the controversy may also be a factor which must be considered, for elementary considerations of fairness may dictate that time be allocated to a person or group which has been specifically attacked over the station, where otherwise no such obligation would exist.*" (Emphasis added.)

[7] That portion of the 1959 amendment to which the Commission referred follows (47 U.S.C. § 315):

"Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the

When a personal attack has been broadcast by a licensee, the rules require that the licensee, within a reasonable time, but not later than one week after the attack, notify the person or group attacked of the "date, time and identification of the broadcast," provide "a script or tape (or an accurate summary if a script or tape is not available)," and offer to the person or group attacked "a reasonable opportunity to respond over the licensee's facilities."

Because "the procedures specified [in prior Commission rulings] [8] have not always been followed [by licensees], even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue," the Commission perceived the need for the specific rules here at issue. The Commission's avowed purpose in embodying the procedural aspects of the "long-adhered to" personal attack principle in rules was twofold: first, to "clarify and make more precise the obligations of broadcast licensees where they have aired personal attacks"; and second, to enable the Commission "to impose appropriate forfeitures * * * in cases of clear violations by licensees which would not warrant designating their application for hearing at renewal time or instituting revocation proceedings but * * * do warrant more than a mere letter of reprimand."

Although the promulgation of the rules represented an attempt to "clarify" a licensee's obligations, the Commission said that the "rules are not designed to answer such questions" as whether a "personal attack" had occurred or whether the person or group attacked was "identified." In spite of the fact that unanswered questions were to be left to the licensee's "good faith judgment," if the licensee remained doubtful of his obligations, the Commission invited prompt consultation to obtain interpretation of its rules.

Some of the comments submitted in opposition to the proposed rules contained expressions of fear that the rules would both discourage controversial issue programming and infringe the first amendment guarantee of a free press. With respect to

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obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

[8] In particular, The Commission referred to the Public Notice of July 26, 1963; *Controversial Issue Programming*, F.C.C. 63-734 and Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415 (1964).

the alleged discouragement of controversial issue programming, the Commission responded:

> Statements that the rules will discourage, rather than encourage, controversial programming ignore the fact that the rules do no more than restate existing substantive policy—a policy designed to encourage controversial programming by insuring that more than one viewpoint on issues of public importance are carried over licensees' facilities.

Regarding the constitutional question, which the Commission believed to be "without merit," it responded:

> As to these particular rules; we stress again that they do not proscribe in any way the presentation by a licensee of personal attacks or editorials on political candidates. They simply provide that where he chooses to make such presentations, he must take appropriate notification steps and make an offer for reasonable opportunity for response by those vitally affected and best able to inform the public of the contrasting viewpoint. That such rules are reasonably related to the public interest is shown by consideration of the converse of the rules—namely operation by a licensee limited to informing the public of only one side of these issues, *i.e.*, the personal attack or the licensee's editorial.

In addition, the Commission referred in this regard to the discussion of the "constitutionality of the fairness doctrine generally in the *Report on Editorialization*," 13 F.C.C. 1246 (1949) and the decision in *Red Lion Broadcasting Co., Inc.*, v. *F.C.C.*, 381 F. 2d 908 (D.C. Cir.), *certiorari granted*, 389 U.S. 968 (1967).[9]

Specific exemptions from the requirements of the personal attack rules were provided in two instances: attacks on "foreign groups or foreign public figures," and personal attacks by qualified candidates on other qualified candidates.[10] The latter

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[9] On January 29, 1968, the Supreme Court entered an order postponing the oral argument in *Red Lion* pending the decision of this court in the instant review and the Supreme Court's action on any petition for certiorari to review this court's decision, 390 U.S. 916 (1968). On the same day, the Supreme Court denied the petition of RTNDA for certiorari before the judgment of this court, 390 U.S. 922 (1968).

[10] This exemption also included attacks by a candidate's authorized spokesmen or campaign associates on opposing candidates, their spokesmen or their campaign associates.

exemption was thought to be appropriate in view of the "equal opportunities" provision of 47 U.S.C. §§ 315 [11] with respect to broadcasts by political candidates.

The Commission's purposes in promulgating the political candidate editorial rules was to clarify the "licensee's obligations in regard to station editorials endorsing or opposing political candidates." The rules require that a licensee who broadcasts an editorial endorsing or opposing a candidate for public office must offer the other qualified candidates or the candidate opposed "a reasonable opportunity * * * to respond." [12] The response can be made through a spokesman of the candidate's choice.[13] A twenty-four-hour notification requirement was imposed because "time is of the essence in this area and there appears to be no reason why the licensee cannot immediately inform a candidate of an editorial." In those situations where a political editorial is broadcast within seventy-two hours of the day of election, the rules require notification before the broadcast. Although disclaiming any intention to prohibit "last-

[11] In pertinent part, section 315 reads:

"(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

"(1) bona fide newscast.

"(2) bona fide news interview,

"(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

"(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection."

[12] The Commission elaborated on the phrase "reasonable opportunity to respond" in its memorandum opinion:

"The phrase: 'reasonable opportunity' to respond is used here and in the personal attack subsection because such an oportunity may vary with the circumstances. In many instances a comparable opportunity in time and scheduling will be clearly appropriate; in others such as where the endorsement of a candidate is one of many and involves just a few seconds, a 'reasonable opportunity' may require more than a few seconds if there is to be a meaningful response."

[13] The provision allowing the spokesman of the candidate to make the response was intended to enable the licensee "to avoid any Section 315 'equal opportunity' cycle" which might be initiated if the candidate himself responded.

minute editorials," the Commission believed "such editorials would be patently contrary to the public interest and the personal attack principle" unless the candidate were notified sufficiently far in advance to present a timely response.[14]

On August 7, 1967 the Commission [15] issued a Memorandum Opinion and Order (adopted on August 2, 1967), enlarging the specific exemptions from the requirements of the previously-adopted personal attack rules.[16] Under the amendment,[17] the personal attack rules were no longer applicable "to the bona fide newscast or on-the-spot coverage of a bona fide news event." The Fairness Doctrine, however, remained applicable to the exempt categories. The Commission considered the amendment necessary because the application of the specific personal attack requirements to these two news categories would be "impractical and might impede the effective execution of the important news functions of licensees or networks" by replacing news broadcasts with responses to personal attacks. The Commission exempted broadcast of on-the-spot coverage of a bona fide news event, because "this area is akin to the newscast area," personal attacks in such programs are "unlikely to be large in number, * * * the notification aspect is relatively less needed in this area," and application of the Fairness Doctrine in this area was sufficient.

"[E]ditorials or similar commentary, embodying personal attacks, broadcast in the course of newscasts," were specifically referred to in the Commission's memorandum opinion as not being exempt from the personal attack rules. If a licensee chose to present a personal attack in these broadcasts, the Commission believed that the licensee should not make the determination as to what the public would or would not hear in response to the personal attack. In addition, "time and practical considerations, discussed with respect to the news itself," were not thought to be germane to "editorials or similar commentary." The Commission did not exempt "news documentaries" from the personal attack rules because they were not

[14] The rules issued on July 10, 1967 were to become effective on August 14, 1967.

[15] Commissioners Bartley, Loevinger, and Wadsworth were absent. Commissioner Cox concurred in the result.

[16] The respective petitions for review were supplemented to take account of the August 7 order.

[17] The amendment as set forth in the August 7 order appears in the appendix to this opinion.

thought to "involve the time and practical considerations" which necessitated the other exemptions and because "a documentary, even though fairly presented, may necessarily embody a point of view." "News interview shows" were not exempted because of the absence of "time and practical considerations" and because a licensee, having "chosen to provide one person with an 'electronic platform' for an attack" was required, by "elemental fairness and the duty to inform the public," to allow the person attacked to respond.

While the instant petitions were pending in this court, the Commission filed a motion requesting authority to once again revise the personal attack rules.[18] We granted the Commission's request, and on March 29, 1968, the Commission[19] issued a Memorandum Opinion and Order (adopted on March 27, 1968) containing a revision of the personal attack rules. The revision[20] further enlarged the categories of news-related programs which would be exempt from the personal attack rules. The two added exemptions covered the "bona fide news interview" and the "news commentary of analysis contained" in either

[18] The Commission's motion was filed on March 4, 1968. As originally presented, the motion requested that this court hold the pending petitions for review in abeyance and authorize the Commission to conduct further rule making proceedings. According to the motion, the Commission proposed to "set aside those parts of the rules * * * dealing with personal attacks" and "to conduct an expeditious rule making proceedings looking toward their revision." The motion was apparently prompted by consultation between the Commission and the Department of Justice and a letter from the Assistant Attorney General, Antitrust Division, to the Commission's chairman. In pertinent part, the letter read:

"[W]e are fully prepared to support the Commission's position that the 'fairness doctrine' is constitutional and within the Commission's statutory powers, and that, as a general proposition, some special rule with regard to personal attack is a valid facet of that doctrine. However, we have some concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions in the rule without materially interfering with the public interest objectives that the rule is intended to serve."

The motion was opposed by NBC. Neither RTNDA nor CBS had any objection to granting the motion so long as the enforcement of the rules, as originally promulgated, was stated pending the proposed revision. In its reply, the Commission abandoned its plan to conduct additional rule making proceedings and instead appended a proposed memorandum opinion and order, revising the personal attack rules. This court's order of March 22, 1968 denied the Commisison's motion to hold the review in abeyance but allowed the Commission leave to revise the personal attack rules.

[19] Commissioners Bartley and Loevinger dissented, the latter writing a lengthy opinion setting forth views critical of the Commissioner's action. Commissioner Cox concurred. Commissioner Johnson concurred in the result.

[20] The amendment as set forth in the March 29 order appears in the appendix to this opinion.

bona fide newscasts, bona fide news interviews, or on-the-spot coverage of a bona fide news event.

In the memorandum opinion accompanying the new revision, the Commission stated that the "revision * * * [was] of a relatively narrow nature," [21] and was in response to allegations of the "inhibiting effects of the rules on the discharge of the journalistic functions of broadcast licenses." The Commission believed that its revision would avoid "*any* possibility of inhibition in these important areas of broadcast journalism" even though "the showing as to inhibiting effects remains speculative." (Emphasis in the original.)

Several additional considerations prompted the Commission to make the new revisions. First, noting the exemptions of four categories of news-type programs from the "equal opportunities" requirement of section 315,[22] the Commission observed that "the personal attack facet can have some similarities to the 'equal opportunities' requirement in its application in this area." Second, the Commission had not found, in the exempt news categories, the "flagrant failures by licensees to follow the requirements of the fairness doctrine" evident in "editorializing by licensees or syndicated programming." Third, the Commission desired "to promote the fullest possible robust debate on public issues."

Although enlarging the scope of the exemptions, the Commission reiterated that the Fairness Doctrine (giving "the licensee considerable discretion") remained applicable to the exempt categories. In particular, when personal attacks occurred in the course of any of the exempt broadcasts, the Commission stated:

> [O]ur revision affords the licensee considerable leeway in these news-type programs but it still requires that

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[21] The Commission did, however, attempt to impart some clarity to the requirements of the personal attack rules. In a footnote, the Commission said:

"Some other matters simply call for a common sense reading of the rule. Thus, if the person attacked has previously been afforded a fair opportunity to address himself to the substance of the particular attack, fairness and compliance with the rule have clearly been achieved. Similarly, as shown by the introductory phrase, 'when, during the presentation of views on a controversial issue of public importance * * *,' the rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack, which makes the honesty, integrity, or character of an identified person or group an issue in that discussion."

[22] See note 11, *supra*.

fairness be met, either by the licensee's action of fairly presenting the contrasting viewpoint on the attack issue or by notifying and allowing the person or group attacked a reasonable opportunity to respond.

The "labelled station or network editorial" and the "news documentary" were not added to the group of exempt broadcasts. Although the Commission viewed "news commentary or analysis" to be "an integral and important part of the news process involved in the category 'bona fide newscast'" and viewed "the bona fide news interview" to be "a means of developing the news and informing the public which the Congress singled out in the 1959 Amendments [to section 315]," [23] the "labelled station or network editorial" was viewed as "akin to * * * the political editorializing area." With respect to its reasons for not exempting news documentaries, the Commission could foresee "no factor of even *possible* inhibition in the case of a documentary, which is assembled over a period of time." (Emphasis in the original.) In adition, the Commission stressed that the documentaries exempted by Congress in section 315 were unique in that, "the appearance of the candidate is incidental to the presentation of the subject matter of the documentary; his rivals may have no connection with the program at all."

Petitioners' primary contention is that the Commission's personal attack and political editorial rules, as amended, will impose unconstitutional burdens on the freedom of the press protected by the first amendment.[24] The petitioners urge that a variety of such burdens will result from the Commission's enforcement of these rules. (1) A licensee will be unwilling to broadcast personal attacks and political editorials or to allow his faciliites to be used as a vehicle for such broadcasts if he is required by the Commission's rules to incur the expense of notifying the person or group attacked, of providing a transcript of the attack, and of donating free time for a reply. This burden will be exacerbated by the potential disruption that

[23] Throughout its memorandum opinion, the Commission emphasized the parallel between its action and the 1959 Amendments. At one point the Commission said:

"We stress that the program categories being exempted are defined in the 1959 Amendments, and that the legislative guides as to these categories, to the extent pertinent, will be followed in this field also."

[24] RTNDA not only urges the unconstitutionality of the specific rules here in issue, but of the Fairness Doctrine itself.

the necessity of airing replies will have in displaced previously schedule programs. (2) A conscientious licensee will be inhibited from speaking out on either controversial issues or impending elections if to do so means that he must provide time for the airing of unorthodox views in reply. (3) The broadcasting of controversial issues of public importance will be inhibited due to the licensee's uncertainty concerning the application of the Commission's rules to a given situation. (4) The licensee's journalistic judgment and spontaneity in programming will be impeded because the Commission's rules require the licensee to determine on a broadcast-by-broadcast basis whether compliance with the rules has been met. (5) An individual licensee affiliated with a network will be reluctant to carry a network program covered by the rules because if a response to a network program broadcast by the affiliate is required, the affiliate must either air the network's response or make independent arrangements to comply with the rules. (6) A licensee will be required to impose rigorous censorship on those who use his facilities since the licensee is individually responsible for all the material which he broadcasts.

Besides the alleged unreasonable burdens imposed upon licensees, the petitioners point to several additional difficulties which they argue inhere in the Commission's rules. They contend that the rules are too vague, given the wide range of severe penalties a licensee faces for failing to comply with them. Petitioners refer to the uncertain meaning of terms in the rules such as "attack," "character," "like personal qualities," and "identified individual." Moreover, they argue that the Commissions offer to make itself available promptly to resolve these interpretative questions could place the Commission in the role of a censor. Through the power to interpret vague rules, the Commission would be in a position to determine which views, opposing those expressed over a licensee's facilities, do or do not merit a right of reply. The petitioners claim that this discretionary power is susceptible to the possibility of abuse. In effect, they urge that the rules could result in the Commission substituting its judgment concerning what is to be broadcast for the judgment of individual licensees. The petitioners argue that in order to avoid this prospect, a licensee might attempt to either broadcast every side of every issue or curtail the broadcasting of controversial public issues and political editorials altogether. The result of each alternative

would be a bland neutrality in the broadcasting media which petitioners urge is not in the public interest.

Neither the Commission's three memorandum opinions nor its brief filed in this court are altogether responsive to the various contentions raised by the petitioners. The Commission characterizes the petitioners' arguments as asserting "a constitutional right to make a one-sided presentation." This nonexisting constitutional right, according to the Commission, is predicated on the petitioners' failure to recognize the substantial differences between the various communication media, particularly the differences between newspapers and radio and television. Because of this failure, the Commission believes that the petitioners' arguments lead to the untenable conclusion that the entire licensing scheme of the Communications Act is unconstitutional. Although conceding that the first amendment applies to broadcasting, the Commission urges that "different rules and standards are appropriate for different media of expression in light of their differing natures." Finally, the Commission flatly asserts in a perfunctory fashion that under the rules as amended, there is no "possibility of inhibition" of licensees.

We approach the primary question raised in this review—the constitutionality of the Commission's personal attack and political editorial rules—against the backdrop of a host of Supreme Court decisions. Those decisions have established the standards by which to access claims that governmental statutes, regulations or practices abridge freedom of speech in violation of the first amendment. For example, the Supreme Court has said: "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely, least, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966). "[S]tandards of permissible statutory vagueness are strict in the area of free expression. * * * Because First Amendment freedoms need breathing space to survive, Government may regulate in the area only with narrow specificity." *NAACP* v. *Button*, 371 U.S. 415, 432, 433 (1963).

Turning from cases dealing generally with the first amendment to cases dealing with the freedom of the press in particular, a series of recent Supreme Court decisions, beginning with *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), delineated the

Court's views on the proper accommodation of the private interests served by libel actions in vindicating those who are defamed with the public interests served by the printed press in criticizing public officials or public figures and in illuminating public issues.[25] In the *New York Times* case, a public official, one of the city commissioners of Montgomery, Alabama, brought a libel action against certain individuals and the Times as a result of critical statements appearing in a full page advertisement. After reviewing previous decisions, the Court said, "None of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." 376 U.S. at 268. The Court observed the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270. Nor was this commitment of recent origin, as, "The right of free discussion of the stewardship of public officials was * * * in Madison's view, a fundamental principle of the American form of government." 376 U.S. at 275. In ruling that actual malice must be the standard of proof in such libel actions, the Court said that under a less stringent standard:

> The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute * * *. Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which First Amendment freedoms cannot survive. 376 U.S. at 277, 278.

The import of *New York Times* and its progeny is that the freedom of the press to disseminate views on issues of public

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[25] Other decisions in which the Supreme Court explored the implications of *New York Times* are: *St. Amant* v. *Thompson*, 390 U.S. 727 (1968) (public official's defamation action after televised speech critical of him); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) (public figures' libel action after printed articles critical of them); *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (action under right of privacy statute after publication of article concerning newsworthy people and events); *Mills* v. *Alabama*, 384 U.S. 214 (1966) (criminal action pursuant to Corrupt Practices Act after publication of a political editorial on election day); and *Garrison* v. *Louisiana*, 379 U.S. 64 (1964) (criminal action pursuant to Criminal Defamation Statute after criticism of public officials).

importance must be protected from the imposition of unreasonable burdens by governmental action. We address ourselves, therefore, to the question whether the Commission's rules here in issue pose unreasonable burdens on licensees.

Despite the Commission's disclaimers to the contrary, we agree with the petitioners that the rules pose a substantial likelihood of inhibiting a broadcast licensee's dissemination of views on political candidates and controversial issues of public importance.[26] This inhibition stems, in part, from the substantial economic and practical burdens which attend the mandatory requirements of notification, the provision of a tape, and the arrangement for a reply.[27]

Although most of the rules' specific requirements have been the subject of Commission rulings pursuant to individual complaints under the Fairness Doctrine, there are two crucial differences between the specific rules we are reviewing and that doctrine. A major premise underlying the Fairness Doctrine is the Commission's trust in the good faith and sensible judgment of a broadcast licensee in dealing with personal attacks and political editorials in a fair and reasonable manner.[28] Under the rules here in question, however, much of the licensees' discretion is replaced by mandatory requirements applicable to each

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[26] The amicus curiae brief filed in this court by the King Broadcasting Company graphically illustrates the inhibitory effect on the broadcast of political editorials of the Commission's requirement of a "reasonable opportunity to respond." In two instances, the broadcast of editorials endorsing candidates for the Seattle City Council was delayed for several weeks while one of the unendorsed candidates in each instance prosecuted a complaint before the Commission alleging that King's division of that person's reply time was unreasonable. Although not ordering King to give the complaining candidates additional reply time, the Commission determined into how many segments the total amount of time should be divided. This action indicates the degree to which the Commission has gone in imposing supervision on licensees.

[27] The Commission's so-called exemptions from the requirements of the personal attack rules, which were contained in the August, 1967 and March, 1968 amendments, are illusory. Our reading of the latest amendment indicates that unless the response of the person attacked is fairly presented by the licensee on the "attack issue" of the "exempt" broadcast, the licensee must adhere to the explicit requirements of the rules. But, the alternative of presenting the reply on the "attack issue" might lead licensees to view every personal attack as a controversial public issue in order to avoid compliance with the strict requirements of the rules. Because of the possible disruptive effect and difficulty in complying with the alternative, a licensee might choose to avoid controversial issue programming altogether so as to remove the possibility of broadcasting personal attacks.

[28] See note 6, *supra*.

broadcast. The other difference between the rules and the Fairness Doctrine is that the only sanction for noncompliance with the Fairness Doctrine is the possibility that a license will not be renewed if the Commission determines that granting a renewal will not serve the "public interest, convenience, and necessity." This determination and the accompanying sanction would be based on the licensee's overall performance during the preceding three years. Under the rules here in issue, however, the question whether a licensee would be subjected to the Commission's broad range of enforcement powers [29] could be determined on the basis of a single broadcast by the licensee. As a consequence, whatever discretion is still reposed in a licensee under the new

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[29] The Commission referred specifically to 47 U.S.C. § 503(b) in this regard in its memorandum opinion issued on July 10, 1967. In pertinent part, that section provides:

"(b) Violation of rules, regulations, etc.; * * *.

"(1) Any licensee or permittee of a broadcast station who—

* * * * * *

"(B) willfully or repeatedly fails to observe any of the provisions of this chapter or of any rule or regulation of the Commission prescribed under authority of this chapter or under authority of any treaty ratified by the United States,

* * * * * *

shall forfeit to the United States a sum not to exceed $1,000. Each day during which such violation occurs shall constitute a separate offense. Such forfeiture shall be in addition to any other penalty provided by this chapter."

In addition, a willful and knowing violation of the Commission's rules will subject the violator to criminal sanctions, which are set forth in 47 U.S.C. § 502. In pertinent part, that section provides:

"Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this chapter, * * * shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

Finally, violations of the Commission's rules could subject a violator to administrative sanctions, which are set forth in 47 U.S.C. § 312. In pertinent part, that section provides:

"(a) Revocation of station license or construction permit.

"The Commission may revoke any station license or construction permit—

* * * * * *

for willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States;

* * * * * *

"(b) Cease and desist orders.

"Where any person * * * (3) has violated or failed to observe any rule or regulation of the Commission authorized by this chapter or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action."

rules with respect to his handling of personal attacks and political editorials must be exercised in the face of the omnipresent threat of suffering severe and immediate penalties.[30]

We need not elucidate the proposition that the public interest will not best be served if the Commission's rules operate to discourage a licensee from engaging in the broadcast of controversial issues or political editorials. Moreover, the public interest will not necessarily best be served if a licensee adheres meticulously to the Commission's rules. Strict compliance with the rules might result in a blandness and neutrality pervading all broadcasts arguably within the scope of the rules. Apparently the Commission views programming which takes sides on a given issue to be somehow improper or contrary to the public interest. Thus, in explaining its failure to exempt documentaries from the personal attack rules, the Commission stated in its memorandum opinion of August 7, 1967, "that a documentary, even though fairly presented, may necessarily embody a point of view." This statement and the thrust of the rules themselves reflect an apparent desire on the Commission's part to neutralize (or perhaps to eliminate altogether) the expression of points of view on controversial issues and political candidates. Such a result would be patently inconsistent with protecting the invaluable function served by the broadcast press in influencing public opinion and exposing public ills.[31]

In addition, the petitioners express fears that a licensee's strict adherence to the requirement that he provide an opportunity to reply might result in the public airing of obnoxious or extreme views. Of course, the Commission might take the position that a licensee need not comply in those situations. But

[30] In its first memorandum opinion, the Commission said, "the *only* new requirement in these rules are the time limits." (Emphasis added.) A crucial difference between the rules and the Fairness Doctrine, however, is the fact that the licensee's obligations are incorporated in specific rules with which he must comply in every instance under the threat of severe sanctions.

[31] In *Mills* v. *Alabama*, 384 U.S. 214, 219 (1966), the Supreme Court discussed the vanguard role of the press in the following language:

"Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials * * * responsible to all the people whom they were elected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."

allowing the Commission selectively to enforce the rules so as to prevent the expression of those views it believes to be contrary to the best interests of the American public would cast the Commission in the role of a censor, contrary to the express provisions of the Communications Act. [32]

An even greater threat of Commission censorship arises due to the lack of specificity in the rules. The Commission has invited a licensee to seek its advice whenever he is unsure of his obligations under the rules. In fact, the Commission itself has recognized the possibility that such situations will arise.[33] But if the rules are so unclear that a licensee needs to obtain advisory interpretations from the Commission, it follows that the Commission, through interpretation of its own vague rules, has the power to effectively preclude the expression of views, whether by a licensee or a respondent, with which it does not agree.[34]

We agree with the petitioners that such terms as "attack," "character," and "like personal qualities" are subject to diverse interpretations and applications. Besides the unclear meaning of these essential terms in the rules, the Commission has failed to articulate the meaning of the rules. That the rules have been twice amended since their initial promulgation (once even while the instant reviews were pending in this court)[35] suggests that the Commission's aims in promulgating the rules are uncertain and changing. In its initial memorandum opinion, the Commission illustrated a situation in which the obligations imposed by the personal attack rules would arise, namely, the making of "a statement in a controversial issue broadcast that a public official or other person is an embezzler or a Com-

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[32] 47 U.S.C. § 326, prohibiting Commission censorship of program content, provides:

"Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."

[33] See text *supra* at 7.

[34] "[I]n appraising a statute's inhibitory effect upon such [first amendment] rights, this Court has not hesitated to take into account possible applications of the statute in the other factual contexts besides that at bar." *NAACP* v. *Button*, 371 U.S. 415, 432 (1963).

[35] The latest revision was prompted, according to an assistant Attorney General, by a "concern that the rule, as drafted, raises possible problems that might be minimized by appropriate revisions."

munist." [36] In its memorandum opinion accompanying the most recent revision of the rules, the Commission, in a footnote, redefined when the personal attack rules become applicable. The Commission said, "The rule is applicable only where a discussion of a controversial issue of public importance contains a personal attack which makes the honesty, integrity or character of an identified person or group an issue in that discussion." The Commission's first formulation suggests that any personal attack occurring during the course of a controversial issue broadcast is subject to the rules. The Commission's last formulation, however, suggests that only those personal attacks which are themselves an issue in the broadcast are subject to the rules.

Another example of the Commission's uncertain position regarding a licensee's obligations under the rules concerns its treatment of personal attacks occurring during the course of editorials or commentary. When the Commission first amended the rules to exempt the "bona fide newscast" and "on-the-spot coverage of a bona fide news event," the Commission said in its accompanying memorandum opinion that the exemption was inapplicable to "editorials or similar commentary." The clear implication from the last quote language is that there is little, if anything, distinguishing "editorials" from "similar commentary." Yet in the memorandum opinion accompanying its last amendment to the rules, the Commission made a distinction between the two categories for it exempted "news commentary or analysis in a bona fide newscast" but left the "labelled station or network editorial" still subject to the rules.[37]

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[36] On previous occasions, the Commission has taken a different view on the rights of communists under the Fairness Doctrine. Thus, in the *Fairness Primer*, the Commission stated, "it is not the Commission's intention to require licensees to make time available to communists or the communist viewpoint." 20 Fed. Reg. at 10418 (1964). The statement quoted in the text apparently suggests that the Commission has altered its view respecting communists. This apparent change of attitude on the Commission's part, however, indicates only that the Commission has been inconsistent in its application of the Fairness Doctrine. And if the rules are vague enough to require a licensee to seek Commission interpretations, there exists the possibility of further such inconsistencies in the future.

[37] A "news commentary or analysis" broadcast "outside one of the exempt program categories" will still be subject to the Commission's rules. Thus, depending solely on when it is broadcast, the same commentary would be either exempt or not exempt. The Commission itself recognized this anomaly, explaining it by saying that the same result occurred under section 315 which it was following.

Similar uncertainty is evident in the Commission's treatment of the "news documentary." The Commission said in creating the various exemptions from the personal attack rules that it was "following the line drawn by Congress" when Congress created the exemptions in section 315. Congress exempted the news documentary, "if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary." Yet the Commission did not exempt the news documentary from the personal attack rules even though any personal attack which might occur would likewise be incidental to the subject of the documentary.[38] The Commission's explanation for its failure to treat news documentaries as Congress treated them in section 315 was expressed by the Commission in its last memorandum opinion: "[T]here is no factor of even *possible* inhibition in the case of a documentary which is assembled over a period of time." (Emphasis in the original.) This explanation is debatable in view of the ever increasing pace of significant news developments and the valuable function served by documentaries in illuminating these developments.[39]

What these examples demonstrate is that the Commission's rules are too vague because they lack standards precise enough to enable a licensee to ascertain whether he is subject to the rules' obligations. When a licensee considers the vagueness of the rules, the mandatory and pervasive requirements of the rules, and the threat of suffering serious sanctions for noncompliance with them, it is likely that he will become far more hesitant to engage in controversial issue programming or political editorializing. Consequently, he will "steer far wider of the unlawful zone." *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958). Given the fast pace of news developments, a licensee will be understandably reluctant to make the difficult on-the-

[38] There is some question whether the Commission's action in following the "line drawn by Congress" in section 315 was appropriate. Section 315 dealt with the problem of equal time for political candidates, not with the problem of personal attacks and political editorials. The fact that Congress exempted certain types of news-related programs from the equal time requirement in no way indicates what judgments Congress would have made (if in fact it could constitutionally have acted in this area at all) in deciding the scope of exemptions with respect to personal attacks and political editorials.

[39] For a discussion of the problems of time and planning that attend the preparation of a news documentary, see W. Wood, ELECTRONIC JOURNALISM, 46–49 (1967).

spot judgments demanded by the Commission's rules, the meaning of which are uncertain to both the licensee and the Commission. In *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525, 530 (1959), the Supreme Court commented on the practical difficulties facing licensees in an analogous situation concerning the censorship prohibition of section 315:

> The decision a broadcasting station would have to make in censoring libelous discussion by a candidate is far from easy. Whether a statement is defamatory is rarely clear. Whether such a statement is actionably libelous is an even more complex question, * * * Such issues have always troubled courts. Yet, under petitioner's view * * * they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, * * * all remarks even faintly objectionable would be excluded out of an excess of caution.

In addition, due to a licensee's uncertainty of his obligations under the rules, it is more likely that he will engage in rigorous self-censorship of the material he broadcasts, than if he were subject only to the Fairness Doctrine.[40] Such self-censorship would restrict the dissemination of views on public issues—essential to an informed citizenry. In *Smith* v. *California*, 361 U.S. 147, 154 (1959), the Supreme Court had occasion to comment on the evils of self-censorship, saying:

> The bookseller's self-censorship compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it the distribution of all books, both obscene and not obscene, would be impeded.

In response to the petitioners' attack on the rules, the Commission has advanced two arguments to support its position that the rules are constitutional. First, the Commission relies on the recent decision in *Red Lion Broadcasting Co., Inc.* v.

[40] The Commission has made clear that "the obligation for compliance with these rules is on each individual licensee." If a licensee offers the use of his facilities to others who make a personal attack, the licensee remains responsible for complying with the Commisison's rules. Under these circumstances, a licensee might also undertake to censor what others broadcast over his facilities.

FCC, 381 F. 2d 908 (D.C. Cir.), *cert. granted*, 389 U.S. 968 (1967). *Red Lion* concerned the challenge by a radio station licensee of a Commission order requiring the licensee to make free reply-time available to a person who had been personally attacked on a program broadcast over the licensee's station. The Commission's order predated the personal attack rules here in question.

In correspondence with the licensee prior to the issuance of the order, the Commission indicated that the procedural requirements (later formalized in the new personal attack rules) should be complied with by the Red Lion radio station. The Commission wrote:

> The licensee, with the exception of appearances of political candidates, is fully responsible for all matter which is broadcast over his station, including broadcasts containing a personal attack. The latter is defined in our recent fairness primer as an attack "* * * on an individual's or group's honesty, character, integrity, or like personal qualities * * *" in connection with a controversial issue of public importance * * *.
>
> Where such an attack occurs, the licensee has an obligation to inform the person attacked of the attack, by sending a tape or transcript of the broadcast, or if these are unavailable, as accurate a summary as possible of the substance of the attack, and to offer him a comparable opportunity to respond.

The Commission also indicated in the course of this correspondence that its ruling was an application of the Fairness Doctrine, "as applied to this situation."

Judge Tamm, who wrote the principal opinion sustaining the Commission's order (Judge Fahy concurred in the result; Judge Miller did not participate in the decision on the merits), devoted the major portion of his discussion to a consideration of the constitutionality of the Fairness Doctrine. He held that Congress did not unconstitutionally delegate its legislative function to the Commission by enacting 47 U.S.C. § 315, which "adopted" the Fairness Doctrine, and he concluded:

> The Fairness Doctrine is not unconstitutionally vague, indefinite, or uncertain, nor does it lack the precision required in legislation affecting basic freedoms guaranteed by the Bill of Rights. * * * [And that] under

> the facts in this case, the requirement under the Fairness Doctrine that a broadcaster may not insist upon financial payment by a party responding to a personal attack does not violate the first and fifth amendments to the Constitution nor is the Doctrine violative of either the ninth and tenth amendments. 381 F. 2d at 930.

We believe two observations are in order with reference to Judge Tamm's opinion and the holding in that case. First, we draw a distinction between the personal attack rules, whether incorporated in an *ad hoc* ruling such as occurred in *Red Lion* or in formal rules such as have now been promulgated by the Commission, and the Fairness Doctrine as referred to in section 315.[41] With that distinction in mind, we are not prepared to hold that the Fairness Doctrine is unconstitutional. Moreover, we do not believe that it is necessary to decide that question in this review. Second, we are in disagreement with the District of Columbia Circuit's holding in *Red Lion*, sustaining the Commission's order, inasmuch as we think that the order was essentially an anticipation of an aspect of the personal attack rules which are here being challenged.

Second, the Commission relies on the alleged difference between the broadcast press and the printed press to sustain its position that the rules are constitutional. Although the Commission denies that its rules either impose unreasonable burdens on licensees or raise any constitutional difficulties,[42] it does concede that "it is undisputed that the protections of the First Amendment apply to broadcasting." But this concession is diluted by the Commission's contention that the broadcast press is entitled to a lower order of first amendment protection than the printed press. The Commission argues (relying on *Na-*

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[41] See page 82, *supra*.

[42] In its three memorandum opinions, much of the Commission's discussion of the constitutional impact of its rules, apart from relying on *Red Lion*, is limited to a cryptic reference in its first memorandum opinion to paragraphs 19 and 20 of the 1949 *Report on Editorializing*. Those two general paragraphs written almost twenty years ago, provide no answer to the constitutional issues raised here. Also inadequate are the frequent conclusional statements that the rules neither burden nor inhibit licensees. Categorical conclusions are no substitute for reasoned analysis. Finally, the Commission, in its brief filed in this court, fails to discuss the impact of *New York Times* and its progeny.

tional Broadcasting Co. v. *United States*, 319 U.S. 190 (1943)) that "since radio is inherently not available to all, its use may be constitutionally regulated in the public interest." [43] What the Commission urges upon this court is the argument that once the need for some regulation of radio and television licensees is recognized—to insure that broadcasting facilities are in the hands of those most qualified and to eliminate interference and other technical problems—it must follow that the Commission's power extends to the promulgation of other kinds of regulations. According to the Commission, a failure to make this concession results in the Commission's inability to impose any regulations, technical or otherwise.[44] This argument begs the question at issue which is, whether the need for technical, financial, and ownership regulation of radio and television licensees sufficiently distinguishes this group from newspaper publishers so as to warrant sustaining the imposition of burdens on radio and television licensees which would be in flat violation of the first amendment if applied to newspaper publishers.

The characteristic most frequently advanced by the Commission to distinguish the printed press from the broadcast press is that radio and television broadcasting frequencies are not available to all. Data comparing the broadcast press and the printed press, however, shows that there are more commercial radio and television stations in this country than there are general circulation daily newspapers.[45] In most major

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[43] *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190 (1943), does not support the Commission's position that the broadcast press is not entitled to the same order of first amendment protection as the printed press. At issue in that case was the validity of the Commission's chain broadcasting regulations. The only constitutional issue raised there was whether the denial of a station license for engaging in certain network practices was a denial of free speech. Moreover, in the earlier case of *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 479 (1940), the Supreme Court said: "[T]he Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."

[44] Illustrative of the Commission's argument on this point is the assertion in its brief that "repeal of the Communications Act would still create chaos."

[45] In 1967 there were 6,253 commercial radio and television stations broadcasting as opposed to 1,754 daily newspapers. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1967, nos. 737, 746 (88th ed.).

metropolitan areas, there are several times as many radio and television stations as there are newspapers.[46]

The Commission replies to this data by arguing that the only barrier to the publication of additional newspapers is an economic one, whereas the barrier to the operation of additional radio and television stations is a technical one—a limitation of available frequencies. For two reasons, the Commission's reply is unpersuasive. First, the fact that a number of allocated radio and television broadcast frequencies remain inoperative suggests that economic barriers also play a significant role in determining the number of operating broadcasters. Second, the recent availability of UHF television frequencies suggests that technological development is not at a standstill and may result in increasing further the availability of broadcasting frequencies in the future.

An additional characteristic is also advanced by the Commission to distinguish the broadcast press from the printed press. Since broadcasting licenses are not available to all and licenses are issued for a limited period of time, the Commission maintains that those who obtain licenses are granted a "privilege" and consequently must act as "trustee[s] for the public" since "the airwaves belong to the public." Therefore, according to the Commission, a licensee, exercising such a privilege, must abide by Commission imposed rules concerning personal attacks and political editorials.

The Commission's reliance on the concept of public ownership of space or airwaves to distinguish the broadcast press from the printed press is as one commentator has observed: "[L]ogically * * * meaningless. To say that the airways or spectrum can

[46] RTNDA has provided us with the following chart illustrating this point:

Standard Metropolitan Statistical Areas	Daily Newspapers	Broadcasting Stations on the Air—AM-FM-TV
Chicago	13	86
Milwaukee	3	32
Indianapolis	9	29
Peoria	2	11
Madison	2	15
Champaign-Urbana	2	12
Green Bay	1	8

(Source: U.S. Bureau of the Census, *County and City Data Book 1967* 636, 637, 672 (Statistical Abstract Supp.); *Editor and Publisher International Year Book—1967*; Television Digest, Inc., *Television Factbook* (Stations Vol., 1967 ed.); Broadcasting Publications, Inc., *1967 Yearbook Issue*.)

be owned by anyone is simply to indulge in fantasy." [47] Carried to its logical conclusion, the concept might sanction inhibitory regulation of other communication media for many such media make use of "publicly-owned" space to disseminate their respective messages. Moreover, the Supreme Court has indicated that "[A] State cannot foreclose the exercise of constitutional rights by mere labels." *NAACP* v. *Button*, 371 U.S. 415, 429 (1963). The Supreme Court has applied this same principle to attempted infringements of freedom of the press. In one such case, *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, 156 (1946), concerning the denial of a second-class postal rate to a magazine, the Court said:

> [G]rave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. * * * Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. * * * [It would be] a radical departure from our traditions * * * to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.

See also *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965).[48] Accordingly, the Commission cannot impose unreasonable burdens on a licensee's dissemination of views on controversial public issues by arguing that obtaining and exercising a broadcast license is a "privilege."

In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee self-censorship, we conclude that the personal attack and political editorial rules would contravene the first amendment. Consequently, the rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in

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[47] Robinson, *The FCC and the First Amendment: Observations on 40 years of Radio and Television Regulations*, 52 MINN. L. REV. 67, 1952 (1967). Professor Robinson's article, an insightful and, at times, critical analysis of the Commission's regulatory activities, was written after the decision in *Red Lion*.

[48] The Supreme Court has expressed the view on occasion that in determining the applicability of first amendment safeguards there is no basis for distinguishing among the various communication media. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948); *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938).

broadcasting to remedy this problem, and that it is unable to attain such fairness by less restrictive and oppressive means. *Keyishian* v. *Board of Regents*, 385 U.S. 589, 602 (1967), and *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). We do not believe the Commission has made such a demonstration.

According to the Commission, "[T]he development of an informed public opinion through the public dissemination of news and ideas concerning the vital issues of the day is the keystone of the Fairness Doctrine" as well as the rules here in question. The Commission assumes, however, that television viewers and radio listeners are in fact ill-informed, that they are isolated from other media of communication, and that those other media do not fully inform them of all sides of controversial public issues. We do not believe this assumption is warranted. The Commission's rules apply only to controversial issues of public importance and to political candidate editorials. Thus, the rules deal with subjects which are likely to receive thorough exposure and illumination in all media of communication. Although we would agree that radio and television are major vehicles for the dissemination of views on controversial public issues, the Commission has failed to demonstrate that the exposure of all sides of a given issue is not achieved by radio and television in conjunction with other media of communication.

An important reason advanced by the Commission for promulgating the personal attack and political editorial rules was to broaden the range of available sanctions to deal with licensees who fail to comply with the requirements of the Fairness Doctrine. In its initial memorandum opinion, however, the Commission disclaimed any intention of using the rules "as a basis for sanctions against those licensees who in *good faith* seek to comply with the personal attack principle." [49] (Emphasis added.) When this disclaimer is added to the Commission's failure to demonstrate the existence of widespread noncompliance with the doctrine, it becomes evident that the Commission's rules are broader than necessary; for they impose substantial burdens on all licensees in the expectation of dealing more severely with a minority of licensees who engage in

[49] The Commission's announced intention to enforce its rules selectively is no substitute for rules narrowly drawn to deal with a specific problem. For despite the disclaimer, a licensee still faces the possibility of suffering the imposition of severe penalties for noncompliance with the rules, thereby chilling the exercise of his first amendment rights.

"willful or repeated" acts of unfairness.[50] In addition, there is some question whether the reply requirements of the rules are well-suited for attaining the fair presentation of all sides of controversial public issues which the Commission believes to be presently lacking. One commentator, considering the efficacy of the reply requirements, has observed:

> I think that the case for the value of the broadcast reply is much weaker than it is assumed to be. Most attacks as I have said are received casually and without advance preparation by the listener. After he has heard it, will he be conditioned to expect, wait for, be alerted to a reply? How will the mandated reply or defense reach him? Does he know whether or when it will be broadcast? The advance programs do not give notice of specific replies (though it would be possible for the regulation to require such notice). It may seem something of a paradox but I would hazard the hypothesis that a reply in a newspaper, i.e., as a news item, is more likely to reach a listener than the later program. The newspaper both in time and space has greater extension and great permanency. JAFFE, THE FAIRNESS DOCTRINE, EQUAL TIME, REPLY TO PERSONAL ATTACKS, AND THE LOCAL SERVICE OBLIGATIONS; IMPLICATIONS OF TECHNOLOGICAL CHANGE 2 (U.S. Government Printing Office, 1968).

The petitioners also challenge the personal attack and political editorial rules on the ground that Congress has not authorized the Commission to promulgate them. They argue that the required explicit Congressional authority, essential in "areas of doubtful constitutionality," *Greene* v. *McElroy*, 360 U.S. 474, 507 (1959), is lacking. And even if it could not be determined that rules clearly abridge first amendment safeguards, they urge that sufficient constitutional doubt remains to invalidate the rules pursuant to the principle enunciated in *Greene* v. *McElroy*.

The Commission has responded to this argument by calling attention to two provisions which it claims authorize the promulgation of the rules in question. First, it points to the "public interest" standard contained in the Communications Act, from

[50] The sanctions available to the Commission under 47 U.S.C. §§ 312, 503(f) require willful or repeated violations by a licensee. The sanctions available under 47 U.S.C. § 502 require a willful and knowing violation by a licensee.

which it finds the grant of authority to devise rules requiring fairness in the treatment of public issues, citing *National Broadcasting Co. Inc.* v. *United States*, 319 U.S. 190 (1943). Second, the Commission maintains that the 1959 amendment of section 315(a) of the Act, clearly and unmistakably conferred upon it authority to refine and implement the Fairness Doctrine which Congress had recognized and approved through the amendment.

Since we have determined that the rules here challenged collide with the free speech and free press guarantees contained in the first amendment, we need not resolve the authorization issue presented in this review.

The Commission's order adopting the personal attack and political editorial rules, as amended, is set aside.

APPENDIX

The full text of the Commission's rules issued on July 10, 1967 follows:

Personal attacks; political editorials.

(a) When, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall, within a reasonable time and in no event later than one week after the attack, transmit to the person or group attacked (1) notification of the date, time and identification of the broadcast; (2) a script or tape (or an accurate summary if a script or tape is not available) of the attack; and (3) an offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall be inapplicable to attacks on foreign groups or foreign public figures or where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesman, or persons associated with the candidate in the campaign.

NOTE: In a specific factual situation, the fairness doctrine may be applicable in this general area of political broadcasts. See, Section 315(a) of the Act (47 U.S.C.

315(a)); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 29 Fed. Reg. 10415.

(c) Where a licensee, in an editorial, (i) endorses or (ii) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (1) notification of the date and time of the editorial; (2) a script or tape of the editorial; and (3) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: *Provided, however*, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this subsection sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

The full-text of the Commission's amendment to the rules issued on August 9, 1967 follows:

(b) The provisions of paragraph (a) of this section shall be inapplicable (i) to attacks on foreign groups or foreign public figures; (ii) where personal attacks are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign, on other such candidates, their authorized spokesmen, or persons associated with the candidates in the campaign; and (iii) to bona fide newscasts or on-the-spot coverage of a bona fide news event (but the provisions shall be applicable to any editorial or similar commentary included in such newscasts or on-the-spot coverage of news events).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*. 29 Fed. Reg. 10415.

The full text of the Commission's amendment to the rules issued on March 29, 1968 follows:

(b) The provisions of paragraph (a) of this section shall not be applicable (i) to attacks on foreign groups or foreign public figures; (ii) to personal attacks which are made by legally qualified candidates, their authorized spokesmen, or those associated with them in the campaign; and (iii) to bona fide newscasts, bona fide news interviews, and on-the-spot coverage of a bona fide news event (including commentary or analysis contained in the foregoing programs, but the provisions of paragraph (a) shall be applicable to editorials of the licensee).

NOTE: The fairness doctrine is applicable to situations coming within (iii), above, and, in a specific factual situation, may be applicable in the general area of political broadcasts (ii), above. See, Section 315(a) of the Act, 47 U.S.C. 315(a); Public Notice: *Applicability of the Fairness Doctrine in the Handling of Controversial issues of Public Importance.* 29 Fed. Reg. 10415. The categories listed in (iii) are the same as those specified in Section 315(a) of the Act.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit.

United States Court of Appeals for the Seventh Circuit

Chicago, Illinois 60604

Tuesday, September 10, 1968

No. 16369, 16498, 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

Petitions for Review of Orders of the Federal Communications Commission

Before Hon. LATHAM CASTLE, *Chief Judge*, Hon. ROGER J. KILEY, *Circuit Judge*, Hon. LUTHER M. SWYGERT, *Circuit Judge*.

This cause came on to be heard on the petitions for review of orders of the Federal Communications Commission, and the record from the Federal Communications Commission, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the Federal Communications Commission's order adopting the personal attack and political editorial rules, as amended, be set aside, in accordance with the opinion of this Court filed this day.

MOTION OF RESPONDENTS FOR STAY OF MANDATE

The United States of America and the Federal Communications Commission, respondents herein, respectfully move, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, that the Court stay its mandate for a period of thirty days upon the conditions set forth below. The ground of this motion is that the respondents intend to file a petition for a writ of certiorari, and that a stay of mandate is necessary to furnish licensees with guidelines for their conduct during the period until certiorari is denied or the Supreme Court renders a decision herein.

In its decision of September 10, 1968, this Court set aside the Commission's rules governing the responsibilities of broadcast licensees where they have carried personal attacks against persons or groups or have broadcast political editorials. The Court recognized that the District of Columbia Circuit had sustained an order requiring a station to furnish free reply time in a personal attack situation prior to adoption of the rules, *Red Lion Broadcasting Company* v. *F.C.C.*, 381 F. 2d 908, *cert. granted* 389 U.S. 968, and that the two circuits were therefore in disagreement as to the constitutionality of the Commission's requirements in the personal attack situation.

If the mandate issues in these cases, there will be great uncertainty on the part of both the Commission and all broadcast licensees as to the applicable requirements to be followed until such time as certiorari is denied or the Supreme Court renders its decision in these cases and in *Red Lion*.[1] The method by which the Commission might apply the general Fairness Doctrine, whose validity was not adjudicated in this Court's decision, would also remain in doubt during this interim period in view of the fact that the Court has rejected the Commission's position that fairness would require the station itself to present the opposing view in a personal attack situation or give time to the person attacked. (Slip Opinion, p. 15, note 27). The significance of these problems, and similar problems with political

[1] Oral argument in Red Lion was postponed to await the outcome of these cases and the disposition of any petition for certiorari to review this Court's decision.

editorials, is of course heightened by the fact that this is an election year and a time, accordingly, when both the Commission and licensees must reach decisions which are not subsequently remediable. We believe all parties would agree that certainty in the governing standards is imperative at this time.

We believe it is also significantly relevant to note that the petitioners permitted the rules to go into effect without seeking an interlocutory stay at the time the rules were adopted in July, 1967, although suspension of the rules pending disposition of the cases or further order of the Court was requested in March, 1968 when respondents petitioned to hold the cases in abeyance pending further rule making proceedings to amend the rules. (See Response of Petitioner CBS, Inc. to Motion of Respondents to Hold Cases in Abeyance and to Authorize Further Proceedings, dated March 14, 1968.) The Court, by order of March 22, 1968, while denying the motion to hold the cases in abeyance, granted leave to revise the rules forthwith in the form then proposed by the Commission, and did not issue a stay order.

In light of these considerations, we request that this Court's mandate be stayed so that the rules may serve as a guide to licensees during this crucial period. The Commission would enforce the regulations only through rulings (which are subject to review in Court), and would undertake, and so advise all licensees, not to impose any fine or forfeiture, institute any renewal or revocation proceedings, or seek criminal penalties, based on conduct occurring during the period of further review. In addition, no pending renewal or revocation proceeding involving the rules would be concluded until the Supreme Court's review is completed. We believe that this course would serve to provide the needed certainty and, at the same time, remove any threat of a severe penalty for licensee error or violation.

For the foregoing reasons, it is requested that the Court stay issuance of its mandate for thirty days, until October 31, 1968, upon the conditions set forth above.

SEPTEMBER 27, 1968.

OPPOSITION OF PETITIONERS RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL. TO MOTION FOR STAY OF MANDATE

We agree with the respondents "that this is an election year" when journalistic decisions will be made "which are not subsequently remediable." But the question here is whether enforcement or non-enforcement of the challenged rules pending Supreme Court review will result in irremediable damage to the public interest. We believe that the enforcement of the rules will irreparably damage the public interest in wide-open, uninhibited and robust public debate at a time in our history when the importance of such debate has never been more crucial and its absence, therefore, more injurious.

The Court found that the Commission's rules discourage and inhibit public debate, tend to induce licensee "self-censorship" (pp. 21–22),[1] might result in "blandness and neutrality" (pp. 15, 17), and that their vagueness and lack of specificity give rise to the threat of Commission censorship (p. 18). It is these rules that the Commission proposes to "enforce," pending further litigation, through orders to licensees which are to be judicially enforced. See Section 401(b) of the Communications Act, 47 U.S.C. § 401(b).

The Commission's willingness to forego certain sanctions is illusory if by this it intended to show that the unconstitutional effects of the rules would be negatived thereby. Licensees are accustomed to obey Commission orders. Further, licensees will be just as much inhibited by the threat of a contempt of court citation in the event of a violation as by the sanctions the Commission is willing to forego.

Moreover, nothing that the Commission has been willing to forego lifts the "substantial economic and financial burdens" upon licensees that the rules impose (p. 15). The Commission still casts itself in "the role of a censor" (p. 18). The requirements of the rule are still "mandatory" (p. 16) and threaten the licensee with "severe and immediate penalties" for their violation. "Blandness and neutrality" (p. 17) and "self-censorship" (pp. 21–22) would be every bit as likely under the conditions of the stay proposed by the respondents as they were previously.

[1] Page citations are to the Court's slip opinion of September 10, 1968.

Thus, the respondents have proposed nothing that would negative the extremely adverse effects upon constitutionally protected speech as found by this Court. They plead only that it "is necessary [for the Commission] to furnish licensees with guidelines" and that "certainty in governing standards is imperative at this time." The term "guidelines" is merely a euphemism for the censorship that this Court condemned. And the question as to how they achieve "certainty" by enforcing rules that the Court found to be vague and uncertain (pp. 19–21) is completely begged by the respondents.

Every Presidential election to date has been held without Commission censorship in the form of the rule it wishes now to enforce. Yet it makes no attempt, in the light of this history, to show that without its "guidelines" a serious danger to the electoral process would be so imminently threatened that the Court should permit enforcement, pending further litigation, of rules found by it to violate the Constitution. This was the respondents' burden, which they have utterly failed to sustain.[3]

For the foregoing reasons, the instant Motion should be denied.

OCTOBER 1, 1968.

[3] That petitioners did not seek an interlocutory stay of the rules at the time of their issuance is not in any sense inconsistent with their present position, as the Government appears to suggest (p. 3). When the rules were issued, a critical Presidential election was not imminent; nor had there been a clear judicial determination of the rules' adverse impact upon broadcast speech.

OPPOSITION OF PETITIONER NATIONAL BROADCASTING COMPANY TO RESPONDENT'S MOTION FOR STAY OF MANDATE

In their motion for a stay of mandate dated September 27, 1968, respondents request that, even though this Court has held the Commission's "personal attack" and "editorializing" rules to be unconstitutional and invalid, the Commission should nevertheless be permitted to continue to enforce these rules against broadcasters, pending application for certiorari to the Supreme Court and a final decision by the Supreme Court. NBC believes that such a stay is neither necessary nor justified; and opposes the respondents' motion.

Under rule 41(b) of the Federal Rules of Appellate Procedure, if the Court grants the requested stay of mandate, and the respondents subsequently file a petition for certiorari, this Court's mandate will be automatically stayed "until final disposition by the Supreme Court." The respondents have made no showing which would justify continued enforcement of the Commission's unconstitutional "personal attack" and "editorializing" rules pending final review by the Supreme Court.

In its decision dated September 10, 1968, this Court held that:

> In view of the vagueness of the Commission's rules, the burden they impose on licensees, and the possibility they raise of both Commission censorship and licensee selfcensorship, we conclude that the personal attack and political editorial rules would contravene the First Amendment. Consequently, the rules could be sustained only if the Commission demonstrated a significant public interest in the attainment of fairness in broadcasting to remedy this problem, and that it is unable to attain such fairness by less restrictive and oppressive means * * *. We do not believe the Commission has made such a demonstration.

The Commission's rules were declared invalid because they constitute an illegal encroachment upon a free press, fundamentally at odds with the Constitution. It is clear, as this Court has found, that the rules inhibit and burden broadcasters in their presentation of news and comment on controversial public issues, and confer upon the Commission an unwarranted power of censorship over such broadcasts. Perpetuating these

oppressive rules during the next several months could be justified only by a very strong showing that an illegal rule is superior to no rule. No such showing has been made by the Commission.

Respondents assert "that a stay of mandate is necessary to furnish licensees with guidelines for their conduct during the period until certiorari is denied or the Supreme Court renders a decision herein." However, respondents fail to explain the basis for their assumption that broadcast licensees will be unable to conduct their business without benefit of the "guidelines" which have been declared by this Court to be an illegal encroachment upon the First Amendment rights of these licensees. The respondents' position is particularly anomalous in the light of this Court's conclusion that, far from being a precise and useful guideline, the rules are unconstitutionally vague.

Nor is the stay warranted by respondents' assertion that their enforcement will be moderated in some fashion during the period of Supreme Court review. To the extent that there is continued enforcement or threat of enforcement the rules will continue to have the oppressive effect which, in the view of this Court, marked them as unconstitutional. If the Commission intends to deprive them of any significant impact during this interim period, there is no compelling reason for the requested stay.

CONCLUSION

For the reasons stated, we submit that this Court's mandate should issue without further delay.

United States Court of Appeals for the Seventh Circuit
Chicago, Illinois 60604

Friday, October 11, 1968

No. 16369, 16498, and 16499

RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, ET AL., PETITIONERS

Vs.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., RESPONDENTS

Petitions for Review From an Order From the Federal Communications Commission

Before Hon. LATHAM CASTLE, *Chief Judge*, Hon. ROGER J. KILEY, *Circuit Judge*, Hon. LUTHER M. SWYGERT, *Circuit Judge*.

This matter comes before the Court on the motion of respondents to stay the mandate of this Court for a period of thirty (30) days, opposition of petitioner, Radio Television News Directors Association, et al to said motion and opposition of petitioner National Broadcasting Company to said motion.

On consideration whereof, *It is ordered* by the Court that the mandate of this Court in the above entitled cause be stayed for a period of thirty (30) days from this date subject to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

U.S. GOVERNMENT PRINTING OFFICE: 1969